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JUDICIAL INTERPRETATION OF DIVORCE JURISDICTION IN THE CONFLICT OF LAWS

Of the various ways in which the common law may develop, that of the reformulation (whether deliberate or unintentional) of traditional concepts, divisions and interpretations of law is not the least important. Though a little unorthodox, it is often effective and, indeed, under certain circumstances the only effective method that judges can adopt to evolve a new rule of law or to expand an existing one. It is suggested that several recent cases [1] on divorce in the field of conflict of laws provide a demonstration of this judicial technique.

In particular, we can see in judgments of the Court of Appeal within the past year or so incursions of two kinds into the principle generally accepted as having been established by the Privy Council's opinion in *Le Mesurier* v. *Le Mesurier*.[2] The well-known principle enunciated by that case is that jurisdiction in divorce belongs exclusively to the courts of the domicile of the parties. The less well-known exception to the principle established in the same case will be considered later. The inappropriateness of the principle in an absolute sense under modern social conditions has been a theme for writers [3] on the conflict of laws for many years, while judges [4] from time to time have voiced their uneasiness at the position of the deserted wife under such a principle of jurisdiction. Even on a matter so devoid of electoral appeal Parliament has taken

[1] *Har-Shefi* v. *Har-Shefi* [1952] 2 All E.R. 821; on appeal, [1953] 1 All E.R. 783. Decision on petition [1953] 2 All E.R. 373; *Joseph* v. *Joseph* [1953] 2 All E.R. 710; 1 W.L.R. 1182; *Travers* v. *Holley* [1953] 3 W.L.R. 507.

[2] [1895] A.C. 517.

[3] Dicey's *Conflict of Laws* (6th ed. 1949), 107; Falconbridge, *Essays in the Conflict of Laws*, 613–4; Read, *The Recognition of Foreign Judgments*, 203 *et seq.*; Kahn-Freund, note in 5 M.L.R. (1941) 66; Tuck, XXII Can.Bar Rev. 686; Morris, XXIV Can.Bar Rev. 73; Graveson, 3 I.L.Q. 371; 26 B.Y.B.I.L. (1949) 207; 37 *Transactions of the Grotius Society*, 149 (1951).

[4] See, *e.g.*, dicta in *Niboyet* v. *Niboyet* (1878) 4 P.D. 1; *Ogden* v. *Ogden* [1908] P. 46; *Stathatos* v. *Stathatos* [1913] P. 46; and *De Montaigu* v. *De Montaigu* [1913] P. 154.

action,[5] though admittedly on the motion of a private member.[6] It is entirely in keeping with the spirit of the age and the development of juristic thought on the conflict of laws that a new interpretation has been placed on this Privy Council decision of 1895, both in a transfer of emphasis from the question of choice of jurisdiction to that of choice of law and, in a second direction, in an extension of the basis of jurisdiction from domicile to residence when justified on the grounds of similarity of legal rules when the question before the court is one of the recognition of a foreign decree of divorce.

A. *Choice of law in relation to religious divorces*

On the first point the case of *Har-Shefi* v. *Har-Shefi* in its various phases constitutes a development with interesting possibilities in the whole field of the recognition of religious forms of marriage and divorce. This litigation arose from the following facts: in 1950 the husband, a domiciled Israeli, married the wife, a domiciled Englishwoman, in Israel according to Jewish form. The marriage was valid in all respects. The parties resided in England until the husband was deported in 1951, when he resumed his residence in Israel and where he continued to be domiciled. In September, 1951, the wife received a Jewish bill of divorcement at the court of the Chief Rabbi in London. In May, 1952, the wife, still resident in England, petitioned the High Court for a declaration that her marriage had been validly dissolved by the Jewish bill of divorcement. The husband had purported to enter an appearance but was unable to furnish an address within the jurisdiction, and because the registrar declined to set this unusual case down for trial without directions from the judge, the wife applied *ex parte* by summons for leave to proceed with the petition.

The judgment of Barnard J. was based on his interpretation of the provision,[7] on which the petition was founded, that "No action or proceeding shall be open to objection, on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right whether any consequential relief is or could be claimed, or not."[8] In dismissing the summons and the petition the learned judge assimilated the wife's suit to one for a declaration of nullity[9] and on the authority of *De Reneville* v. *De Reneville*[10] held that the proper court to consider

[5] Matrimonial Causes Act, 1937, s. 13; Matrimonial Causes (War Marriages) Act, 1944; Law Reform (Miscellaneous Provisions) Act, 1949, s. 1; Matrimonial Causes Act, 1950, ss. 16 and 18.

[6] Sir Alan Herbert.

[7] R.S.C. Ord., 25, r. 5.

[8] Applied to divorce practice and procedure by Matrimonial Causes Rules (S.I. 1950, No. 1940), r. 80.

[9] "The wife is, in effect, seeking a declaration of nullity on the ground that her marriage has been validly dissolved": *per* Barnard J. [1952] 2 All E.R. at 822.

[10] [1948] P. 100.

the validity of the divorce was the court of the domicile. In so doing he impliedly treated the wife as not being domiciled in England, *i.e.*, as being domiciled in Israel, on the presumption that the divorce on which he was asked to make the declaration was invalid, so that by English law the wife, being still married, retained the Israeli domicile of her husband. The implication that the divorce was invalid and that the wife therefore retained her husband's domicile was manifestly sound, since exclusive jurisdiction in divorce in England belongs to a court, *i.e.*, the High Court, other than the one purporting to dissolve this particular marriage. What appears to the writer unfortunate in this judgment is the assimilation of the declaratory jurisdiction here involved to that in nullity of marriage. Nullity concerns marriages that are either void or voidable, as *De Reneville's* case amply shows: no question of voidness or voidability ever arose in the *Har-Shefi* marriage. It was perfectly valid at all times. The only question was whether the purported Jewish divorce had or had not effectively put an end to it, not retrospectively (as would a nullity decree), but simply from the date of the delivery of the bill of divorcement. Furthermore, the declaratory jurisdiction here invoked involves no change of status of the parties, but merely a statement of what their status is. Nullity jurisdiction, on the other hand, at least so far as concerns voidable marriages, is (apart from statute [11]) deliberately and properly confined to a basis of domicile or possibly common residence,[12] since the real effect of a decree of annulment is retrospectively to change the status of the parties from married to unmarried, domicile being the normal basis of jurisdiction over personal status.[13]

From the dismissal of her summons and petition the wife appealed,[14] and her case was heard by the Court of Appeal consisting of Singleton, Denning and Hodson L.JJ. After declaring that "a petition cannot be dismissed solely by reason of the fact that all that is sought is merely a declaratory judgment," [15] Singleton L.J., without expressly dissenting from the other members of the court, agreed broadly with the view of Barnard J., that the proper court to consider the validity of the divorce was that of the domicile, though he would apparently have been prepared to exercise jurisdiction if adequate evidence of the law of the domicile (Israel) had been presented to the court. Several points arise on a reading of this judgment. In the first place, it is a satisfactory, and indeed a necessary, construction of the Rule of Court that the court has jurisdiction to give a declaratory judgment in matrimonial

11 Matrimonial Causes (War Marriages) Act, 1944; Matrimonial Causes Act, 1950, s. 18 (1).

12 See *De Reneville* v. *De Reneville* [1948] P. 100; *Casey* v. *Casey* [1949] P. 420; compare *Hutter* v. *Hutter* [1944] P. 95 and *Easterbrook* v. *Easterbrook* [1944] P. 10.

13 *Inverclyde* v. *Inverclyde* [1931] P. 29.

14 [1953] 1 All E.R. 783.

15 *Ibid.*, 786.

causes even where no other particular relief or remedy is requested. Secondly, the learned Lord Justice was not prepared to assume that the Jewish divorce was valid for the purpose of releasing the wife from her husband's domicile, so as to enable her to acquire a domicile in England. It appears that the references by both Barnard J. and Singleton L.J. to the court of the domicile as the proper court to determine the validity of the divorce are not easy to reconcile with the established practice of the English courts. The question has hitherto been "Has the court making the decree jurisdiction to do so?"[16] *i.e.*, a question of choice of jurisdiction, not, "Is the decree valid by the law of the domicile?" *i.e.*, a question of choice of law.[17] Hitherto the only question in divorce has been one of choice of jurisdiction: as applied to the particular facts of the *Har-Shefi* case the simple question on these traditional lines would have been, "Has the Beth Din in London jurisdiction in divorce?" If not, the divorce is invalid; if such jurisdiction in England is recognised, the further question arises: "On what basis or bases may such jurisdiction be exercised?" Must the parties be domiciled in England, as in the case of High Court jurisdiction? Or would it be too destructive of the established jurisdictional pattern to allow parties domiciled in England to resort to unilateral religious divorce? In other words, must the parties be *not* domiciled in England? If it is agreed that the major question involved in the case is one of jurisdiction, not of choice of law, we may speculate on the result of an application in the High Court for an order of certiorari directed to the Chief Rabbi to establish the divorce jurisdiction of the London Beth Din as an English divorce court additional to the Divorce Division of the High Court.[18]

All three Lords Justices agreed that a purely declaratory jurisdiction existed in matters of divorce.[19] Lord Justice Denning's reference to a remark by Sir Herbert Jenner is much in point, in which the latter explained the reason for the ecclesiastical declaratory jurisdiction, "on the ground that it is material for their own sakes and that of the public that their status should be known; and the object of the proceeding is to have the status of the parties to the marriage defined by the sentence of a competent court."[20] No less in point was the warning of Hodson L.J. against encouraging

[16] *Bater* v. *Bater* [1906] P. 209.

[17] This approach has hitherto been justified only in the type of situation covered by the principle in *Armitage* v. *Att.-Gen.* [1906] P. 125. The point is considered by Professor J. A. C. Thomas in 2 *International and Comparative Law Quarterly*, 444 *et seq.*

[18] From the juridical nature of the Jewish *Get* (see the learned note by Vesey Fitzgerald, 3 I.C.L.Q. (1954) 159) it would seem appropriate to apply the normal test of choice of jurisdiction.

[19] The implications in the conflict of laws of this aspect of the case are considered in a learned article by Francescakis, 19 *Zeitschrift für ausländisches und internationales Privatrecht* (1954) 58.

[20] *Ray* v. *Sherwood & Ray* (1836) 1 Curt. at 227.

" applications for what may be called naked declarations where no sensible purpose is served thereby." [21]

Having agreed that a simple declaratory jurisdiction existed, Denning and Hodson L.JJ. proceeded to determine the bases on which it should be exercised. Denning L.J. sought a basis in the domicile of the wife in England: that depended on the validity of the Jewish divorce, " *and that in turn depends on the law of Israel.*" [22] In these words lies a new development of English law. The validity of the divorce for an English court is generally thought to depend, with respect to the learned Lord Justice, on whether the court pronouncing the divorce had jurisdiction to do so. The question is one of jurisdiction, not as has been said already, one of choice of law. So far as established rules of English conflict of laws are concerned the attitude of the law of the domicile to a divorce pronounced in England is irrelevant to the validity of that divorce in an English court. One cannot easily fit into existing principles the further remark of the learned Lord Justice that he did " not place any reliance on the fact that the bill of divorcement was delivered in England." [23] By all traditional standards no fact could have been more relevant. The test of validity is conclusively moved from the realm of jurisdiction into that of choice of law by Denning L.J.'s further observation that " The parties were at the time of the divorce domiciled in Israel, and the validity of the divorce must depend on the law of Israel and not on the law of England." [24]

Unlike Singleton L.J., Hodson L.J. was prepared to assume the validity of the divorce for the purpose of assuming jurisdiction on the basis of the wife's domicile. The learned Lord Justice agreed with Barnard J. in assimilating the bases of this declaratory jurisdiction with those of nullity proceedings. Whatever objections may be taken to the analogy, the rule at least is clear—as clear, that is, as are the bases of nullity jurisdiction.

Thus we reach the final chapter of this unusual story. In the Divorce Division Pearce J. was presented with the direct issue on a petition by Mrs. Har-Shefi for a declaration that her marriage had been validly dissolved by the Beth-Din proceedings.[25] In making the declaration as asked the learned judge remarked that the marriage had been validly dissolved by the only form of divorce open to a Jew domiciled in Israel. Following the Court of Appeal, Pearce J. held that the validity of the divorce depended on the law of the parties' domicile, and after citing the passage from the opinion of the Privy Council in *Sasson* v. *Sasson* [26] in which Lord

[21] [1953] 1 All E.R. at 789.
[22] *Per* Denning L.J., *ibid.*, at 788.
[23] *Ibid.*, at 788–9.
[24] *Ibid.*, at 789.
[25] *Har-Shefi* v. *Har-Shefi* [1953] 2 All E.R. 373.
[26] [1924] A.C. 1007 at 1009.

Dunedin remarked, "The case of *Le Mesurier* v. *Le Mesurier*[27] finally settled that the proper and only *court* is the *court* of the domicile," again changed the whole emphasis from one of jurisdiction to one of choice of law by commenting,[28] "To hold that a marriage which has been legally dissolved according to the *law* of the domicile continues binding in this country is to create confusion and hardship, and is, in my opinion, contrary to the principle laid down in *Le Mesurier* v. *Le Mesurier* and the principles of international law."

Jurists are under no duty to maintain the solemn fiction that judges never make or change the law, but merely declare what it is and always has been. Lord Justice Denning has tried to free the judges themselves from this fetter of traditional judicial technique.[29] For several years English writers on the conflict of laws, with Dr. G. C. Cheshire as their most able leader, have been advocating a shift of emphasis in matrimonial causes from questions of jurisdiction to those of choice of law.[30] In the *Har-Shefi* cases it appears to be taking place; but these decisions bring in their train several difficult problems which cannot be investigated here. At least, however, the question of the validity of a Jewish divorce given in England between parties domiciled in Israel appears firmly settled: settled, that is to say, until we refer to a still more recent case. In the light of the principle that the Court of Appeal is generally bound by its own decisions[31] it is of interest to examine *Joseph* v. *Joseph*,[32] in which the same court considered the nature of a Jewish bill of divorcement delivered by the Beth Din in London purporting to dissolve the marriage of two Jews domiciled in China at some date before the proceedings where, as in Israel, the *Get* would be recognised as a valid divorce.

The two reports[33] of this case are dissimilar on the most material fact of the domicile of the parties at the date of the Rabbinical decree. In neither report is the point considered in the actual judgments. The statement of facts in the *Weekly Law Reports* includes the passage: "The parties, both of whom were of the Jewish faith, were married on June 13, 1926, in the Synagogue in Shanghai. . . . In 1936 the husband gave up his work in Shanghai, left his wife and went to India. In April, 1947, he settled in England and acquired an English domicile of choice."[34] Beyond stating that "The parties who were of the Jewish race and faith were married in Shanghai in 1926 where the husband was then

[27] [1895] A.C. 517.
[28] [1953] 2 All E.R. at 375.
[29] *The Changing Law* (1953), Preface, p. vii.
[30] Cheshire, *Private International Law*, 4th ed., 346; Graveson, *Conflict of Laws*, 2nd ed., 353; 37 *Grotius Society Transactions*, 149.
[31] *Young* v. *Bristol Aeroplane Co.* [1944] K.B. 718.
[32] [1953] 2 All E.R. 710.
[33] [1953] 2 All E.R. 710; [1953] 1 W.L.R. 1182.
[34] [1953] 1 W.L.R. 1182.

domiciled. In 1937 the husband deserted the wife . . ." [35] the *All England Law Reports* give no indication of the domicile of the parties at the date of the *Get*, thereby inducing the presumption of an indefinite continuance of the husband's Chinese domicile. If the latter were the case, the facts would be hardly distinguishable from those in *Har-Shefi* v. *Har-Shefi*, involving a continuance of the husband's Israeli domicile, and the decisions in the two cases would be not merely irreconcilable but in flat contradiction. For the purpose of the present comparison the more complete and affirmative statement of domicile will be adopted.[36]

In striking contrast to the judgments in *Har-Shefi* v. *Har-Shefi* are the Court of Appeal's pronouncements in *Joseph's* case.

Somervell L.J. said,[37] "She asked for a divorce valid according to Jewish law. There is no suggestion that both parties did not realise that it had no legal effect in English law." Jenkins L.J. spoke words to the same effect [38]: "Counsel for the wife invited us to ignore the *Get* given to the wife as a mere nullity having no effect in English law, either as a decree of divorce or as an agreement to separate. I agree with him that the *Get* has neither operation. It clearly does not effect a divorce. . . ." Finally let us note the words of Hodson L.J.,[39] "The certificate is a valid document for what it purports to be, namely, a certificate of a Jewish bill of divorcement given according to Jewish religious law. It does not purport to be a decree of divorce dissolving the marriage according to the law of this country."

All three judgments in *Joseph* v. *Joseph* are in complete accord with the traditional pattern of English principles of conflict of laws, the most relevant of which is that only the High Court has jurisdiction to pronounce a valid decree of divorce in England. How, then, should we attempt to reconcile this case with the principles applied in the *Har-Shefi* litigation? It is, perhaps, unfortunate that *Joseph* v. *Joseph* was heard in the Court of Appeal before the court's decision in *Har-Shefi* v. *Har-Shefi* was fully reported; though one member of the court, Hodson L.J. had taken part in the decision of both cases. Let us see what relevant facts were common and what different in the two cases.

Similarities

1. In both cases the parties were of Jewish faith. In *Har-Shefi* they had been married, and the husband was then domiciled in Israel. In *Joseph* they had been married, and the husband was then domiciled in China, though the domiciles at that date are of little relevance to the point at issue.

[35] [1953] 2 All E.R. 710.
[36] As also by Dr. Schmitthoff, *English Conflict of Laws*, 3rd ed., 347, note 34.
[37] [1953] 2 All E.R. 710, at 712.
[38] *Ibid.*
[39] *Ibid.*, at 713.

2. In both cases a bill of divorcement had been delivered in London under the procedure of the Beth Din, the London court of the Chief Rabbi.

Differences

1. In *Har-Shefi* the petitioner was asking the court to declare that the Jewish divorce had validly dissolved her marriage. For the purpose of giving the wife an English domicile in her own right so as to allow the court to exercise jurisdiction on that basis, Hodson L.J. in the Court of Appeal, held that "the crucial fact that the wife has been validly divorced must be assumed so as to give her an English domicile at the material date, namely, the date of the institution of these proceedings."[40] The learned Lord Justice, in other words, simply made an assumption with respect to a matter that was not directly in issue before the court, in order that the court should be able, if required, to consider on the merits the assumption it had made. Strictly, therefore, Hodson L.J. has maintained a consistently logical position in respect of Jewish marriages in both the *Har-Shefi* and *Joseph* cases. Of the other members of the court, Singleton L.J., following Barnard J. in the court below, was not prepared to make such an assumption in the wife's favour, while Denning L.J. employed reasoning[41] which omitted this assumption in favour of the wife's English domicile. Pearce J., on the hearing of the wife's petition, was bound by the holding of the higher court that he had jurisdiction, and understandably did not examine the reasons for the existence of such jurisdiction but proceeded to examine the validity of the divorce by Israeli law.

2. A further difference of note between the *Har-Shefi* and *Joseph* cases is that, in the former, the wife was concerned that the court should recognise the Jewish proceedings as a divorce, whereas in the latter she was anxious to minimise their effect. In *Joseph* v. *Joseph* the wife had filed a normal petition for divorce on the grounds of her husband's desertion five years earlier. In the interval, at her request, her husband had obtained a Jewish divorce in London, and the main question before the court was whether the existence of this divorce had the effect of putting an end to the husband's desertion. If it did, as was held, the wife's petition on the ground of desertion must fail; but the court went no further than holding that the Jewish divorce had effect in England as a separation by agreement.

3. Accepting an English domicile of the parties at the date of the *Get* in *Joseph's* case as against an Israeli domicile in *Har-Shefi's*

[40] [1953] 1 All E.R. at 790.

[41] *i.e.*, (a) that the validity of the divorce was governed by Jewish law, evidence of which could be given before English courts; (b) "that the petitioner is an Englishwoman resident in this country, intending to make her life here, and she wants to know how she stands in this country"—*ibid.*, at 789.

involves the crucial distinction between the two cases, for the obvious reason that divorce jurisdiction depends upon domicile. The underlying problem before the court in cases of this kind which involve consideration of Oriental personal laws is perhaps not so much whether a divorce results from an unilateral act of the husband, such as the Mohammedan *talak* and, in certain respects, the Jewish *Get*, but the modified application of a personal law founding jurisdiction and based on territorial domicile to a personal law based on religious adherence. We are accordingly driven to ask two questions : 1. Should the basis of divorce jurisdiction in English law be the same for marriages of all kinds when the parties are domiciled in England at the date of the divorce proceedings; or in other words, should English law recognise the validity of divorces in England in proceedings or forms other than those of the High Court when such forms are permitted by the religious personal law of the parties territorially domiciled in England? The Court of Appeal in *Joseph* v. *Joseph* has impliedly answered this question in the negative. 2. Where parties are not domiciled in England at the relevant date, should English law recognise a divorce pronounced *in England* according to the forms of the personal religious law of the parties? *Har-Shefi's* case gives an affirmative answer to the second question, but subject to an important limitation, namely, that at the date of the divorce the parties are domiciled, *in the territorial sense of English law*, in a country in which their personal religious law can operate fully in respect (at least) of their divorce. Thus, while the English court would recognise a *Get* given in England in respect of Jewish parties then domiciled in Israel, it would not do so if they were at that date domiciled in Scotland, New York State or any country in which divorce jurisdiction was founded on the Western concept of territorial domicile, subject only to the well-known exception in *Armitage* v. *Att.-Gen.*[42]

The weight of modern authority still places the emphasis on domiciliary jurisdiction in divorce in the tradition of the main principle of *Le Mesurier* v. *Le Mesurier*.[43] But a foothold, at least, has been cut by Denning L.J. and Pearce J. for argument in support of the modern view that it is more important in matters of personal status that the personal law should be applied than that the courts of one country or another should have jurisdiction.[44]

B. *Choice of jurisdiction in the recognition of foreign decrees of divorce*

The second direction in which the principle of *Le Mesurier* v. *Le Mesurier* has recently been reinterpreted is found in the judgments

[42] [1906] P. 135.
[43] [1895] A.C. 517.
[44] Cheshire, *Private International Law*, 4th ed., 346; Graveson, in 28 *British Year Book of International Law*, 273 *et seq.*

of the Court of Appeal in *Travers* v. *Holley*.[45] Unlike the *Har-Shefi* cases, *Travers* v. *Holley* involves the primary question of choice of jurisdiction, not of choice of law. As this decision has already received learned comment,[46] it is only necessary in the present context to recall the facts and the special relevance of the judgment to the reinterpretation of *Le Mesurier's* case. Briefly, the appellant husband, of English domicile of origin, had gone with his wife in 1937 to live in New South Wales, where he was held to have acquired a domicile of choice. In 1944 the New South Wales court granted a decree of divorce on the wife's petition based on desertion by her husband since 1940. At the date of the divorce the husband was no longer domiciled in New South Wales, and the court's jurisdiction was based on local statutory jurisdiction[47] corresponding closely to the English jurisdictional rule in favour of the deserted wife.[48] The question of the recognition of this decree arose on a petition in England by the husband for divorce against his wife (who had remarried on the strength of the New South Wales decree).

For more than half a century English courts have rejected any other judicial basis of divorce jurisdiction than domicile. They have done so on the authority of the most decisive passage in the judgment of the Privy Council in *Le Mesurier* v. *Le Mesurier*[49] in which Lord Watson declared, "Their Lordships have in these circumstances and upon these considerations come to the conclusion that, according to international law, the domicile for the time being of the married pair affords the only true test of jurisdiction to dissolve their marriage." The principle has been followed by English courts of first instance,[50] the House of Lords on a Scots appeal,[51] and by the Judicial Committee itself.[52] In a qualified form it was indeed used by the House of Lords in an English appeal[53] thirty years before *Le Mesurier's* case. And yet the judgment which embodies this very principle is being used as authority by the Court of Appeal to support a conflicting proposition, namely, the recognition of a foreign divorce decree based on residence. To appreciate the manner in which this is done, and done legitimately (it is submitted) within the scope of the doctrine

[45] [1953] 3 W.L.R. 507.

[46] Griswold, 67 *Harvard Law Review* (1954) 823; Francescakis, 19 *Zeitschrift für ausländisches und internationales Privatrecht* (1954) 58; Gow, 3 I.C.L.Q. (1954) 152; Thomas, *ibid.*, at 156; Mann, 17 M.L.R. 79; Blackburn, 17 M.L.R. (1954) 471.

[47] Matrimonial Causes Act, 1899, s. 16 (*a*) (New South Wales).

[48] Matrimonial Causes, Act, 1937, s. 13, re-enacted with amendments in Matrimonial Causes Act, 1950, s. 18 (1).

[49] [1895] A.C. 517.

[50] *H.* v. *H.* [1928] P. 206.

[51] *Lord Advocate* v. *Jaffrey* [1921] 1 A.C. 146.

[52] *Att.-Gen. for Alberta* v. *Cook* [1926] A.C. 444.

[53] *Shaw* v. *Gould* (1868) L.R. 3 H.L. 55.

of precedent, we should perhaps refresh our minds on the circumstances of *Le Mesurier's* case.

Lord Watson delivering the opinion of the Privy Council in *Le Mesurier* v. *Le Mesurier*[54] considered in the early part of his judgment the jurisdiction of the courts of Ceylon to make a decree of divorce between two British subjects. He accepted the proposition that the jurisdiction of the District Court of Matara would be established if its jurisdiction were derived "either from some recognised principle of the general law of nations or from some domestic rule of the Roman-Dutch Law." The effect of the first type of jurisdiction would be that any decree dissolving a marriage should be respected by the tribunals of every civilised country.[55] "On the other hand," continued Lord Watson, "a decree of divorce *a vinculo*, pronounced by a court whose jurisdiction is solely derived from some rule of municipal law peculiar to its forum, cannot, when it trenches upon the interest of any other country to whose tribunals the spouses were amenable, claim extraterritorial authority." Thus we find the context of the authority for holding in *Travers* v. *Holley*[56] that a decree of a foreign court based on a residential jurisdiction may under certain circumstances be recognised in England; for both Somervell and Hodson L.JJ. (Jenkins L.J. dissenting) used the sentence last cited as authority for their decision. Recognition of a foreign divorce decree would depend on whether the non-domiciliary basis of divorce jurisdiction was or was not common to both the English and the foreign trial court. "On principle it seems to me plain," declared Somervell L.J.,[57] "that our courts in this matter should recognise a jurisdiction which they themselves claim."[58] Hodson L.J. expresses a similar view[59] in a very notable judgment which faces squarely the main issue of how to deal with out-of-date precedents. At a date subsequent to 1895 Parliament has conferred on the English courts divorce jurisdiction on a basis of residence, and the argument that the domicile of both spouses at the time of the proceedings is the sole test of jurisdiction in divorce "is not valid at the present day."[60] The conclusion is both enlightened and illuminating that, "The principle laid down and followed since the *Le Mesurier* case must be interpreted in the light of the legislation which has extended

[54] [1895] A.C. 517.

[55] *Ibid.*, at p. 527.

[56] [1953] 3 W.L.R. 507.

[57] *Ibid.*, at p. 511.

[58] *Cf. Addison* v. *Brown* [1954] 2 All E.R. 213, in which the English court upheld a maintenance agreement excluding the jurisdiction of a Californian court, though a similar exclusion of English jurisdiction would be void on grounds of public policy according to *Bennett* v. *Bennett* [1952] 1 K.B. 249.

[59] "I would say that where, as here, there is in substance reciprocity, it would be contrary to principle and inconsistent with comity if the courts of this country were to refuse to recognise a jurisdiction which *mutatis mutandis* they claim for themselves": *ibid.*, at p. 516.

[60] *Per* Hodson L.J., at p. 515.

the power of the courts of this country in the case of persons not domiciled here." [61]

In thus ably solving one question, this decision raises others. It does so not only in the field of conflict of laws but more broadly in respect of the principles of the interpretation of the doctrine of precedent and, in particular, with regard to the principle (and its exceptions) that the Court of Appeal is bound by its own decisions.[62] Within the confines, wide though they be, of private international law itself an apparent conflict is presented somewhat analogous to one familiar in the field of international contracts,[63] between this decision of the Court of Appeal on the one hand and on the other the decisions of the Judicial Committee both in *Le Mesurier's* case and *Att.-Gen. for Alberta* v. *Cook* [64] and of the House of Lords on the Scottish appeal of *Lord Advocate* v. *Jaffrey*.[65] Yet how can one say that *Travers* v. *Holley* conflicts with *Le Mesurier* v. *Le Mesurier* when part of the single judgment in the latter is cited as authority, partial at least, in two of the three judgments in the former? It is suggested that the conflict, if such there is, originates in and derives from the single judgment in *Le Mesurier's* case itself. On one side lies the purely negative statement of Lord Watson, seized upon by the Court of Appeal, that "a decree of divorce *a vinculo*, pronounced by a court whose jurisdiction is solely derived from some rule of municipal law peculiar to its forum, cannot, when it trenches upon the interest of any other country to whose tribunals the spouses were amenable, claim extraterritorial authority." We have seen how the court was able to employ this negative passage in a positive and affirmative sense to uphold the New South Wales decree. We may set against this extract the later and very affirmative passage of the judgment of the Judicial Committee that we have also cited above, that "the domicile for the time being of the married pair affords the only true test of jurisdiction to dissolve their marriage." We would submit that these two passages conflict only in the sense that an exception conflicts with its rule or local custom conflicts with general law. In other words, a full statement of the rule of divorce jurisdiction would embody both the principle of domicile and the exception in favour of some non-domiciliary rule of the forum. The Court of Appeal in *Travers* v. *Holley* must be credited, not with ignoring the domiciliary principle of divorce jurisdiction but with applying it more fully than had been done before by realising that the case before the court raised

[61] *Per* Hodson L.J., at p. 516.

[62] *Young* v. *Bristol Aeroplane Co.* (above).

[63] Between the decision of the Court of Appeal in *The Torni* [1932] P. 27, and that of the J.C.P.C. in *Vita Food Products, Inc.* v. *Unus Shipping Co., Ltd.* [1939] A.C. 277.

[64] [1926] A.C. 444.

[65] [1921] 1 A.C. 146.

the applicability of the exception to the principle. When, therefore, we speak of the development of case law through the reformulation of traditional interpretations of decisions, we can find in *Travers* v. *Holley* an example in which emphasis has been moved from the traditional rule to its hitherto almost ignored exception. There are in the law reports many possibilities of this kind for the internal development of the law: if to them we add the broad principle of interpretation of old principles in the light of subsequent statutes, perhaps the most important lesson of *Travers* v. *Holley*, we need not fear for the future of the common law.

Postscript

In a learned note [66] in this *Review* which appeared after the above was written Mr. Blackburn has argued that the decision in *Travers* v. *Holley* is bad law, as it not only conflicts with the House of Lords' decision in *Shaw* v. *Gould* [67] (which denied recognition to a Scots decree of divorce not founded on domicile in the English sense) but thereby under one of the exceptions in *Young* v. *Bristol Aeroplane Co.*[68] need not bind the Court of Appeal in the future. If the first point can be sustained, the second follows automatically. It may, therefore, be observed that *Shaw* v. *Gould* was an English appeal to the House of Lords decided on principles of English law, though the question before the House was not simply one of the recognition of a foreign decree of divorce where domiciliary jurisdiction was lacking, but, in the words of Lord Westbury, "This case depends on the answer to the question, whether a marriage solemnised in England at the time can be dissolved by the decree of a foreign tribunal." It is thus arguable, though with limited justification, that the decision must be restricted to foreign divorces of English marriages. Secondly, the special context of the divorce in *Shaw* v. *Gould* was the non-existence of judicial divorce in England at the date of the Scottish decree.[69] The subsequent enactment of the Matrimonial Causes Act in 1857, requiring the court to follow as nearly as may be the principles of the former ecclesiastical jurisdiction, caused great uncertainty as to the basis of English divorce jurisdiction, as is evidenced in *Niboyet* v. *Niboyet*.[70] For these reasons the opinion of the Judicial Committee in *Le Mesurier* v. *Le Mesurier*,[71] though not absolutely binding as a matter of precedent, has been treated since 1895 as a correct statement of the basis of English divorce jurisdiction and of that of the recognition of foreign decrees. Between *Shaw* v. *Gould* and *Le Mesurier* v. *Le Mesurier* in the sense in which it has been used in *Travers* v. *Holley*

[66] Above, p. 471.
[67] (1868) L.R. 3 H.L. 55.
[68] [1944] K.B. 718.
[69] See judgment of Lord Cranworth, and *Lolley's Case* (1812) Russ. & R. 237.
[70] (1878) 4 P.D. 1.
[71] [1895] A.C. 517.

there is clearly some discrepancy. On a strict application of the doctrine of precedent Mr. Blackburn has a formidable argument. On a historical and factual reading of the cases and their social, legislative and judicial contexts, however, it is far from certain that *Shaw* v. *Gould* is decisive in the circumstances of the recent case. But at least it is relevant. The failure of the Court of Appeal to consider it is remarkable; and the necessary reconciliation remains a problem for the future.

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IDENTITY IN CONTRACT AND THE POTHIER FALLACY

A FURTHER paper on the effect of mistake as to identity on the formation of contract would appear superfluous were it not for the fact that previous surveys of the subject have revealed numerous anomalies which have never been adequately explained. These anomalies appear to have been created artificially by *a priori* reasoning, and the present contention is that the majority of them could be removed by adopting a different approach to the definition of mistake. The object of this paper is to formulate such a new definition based on the authority of decided cases, and to reassess the value of the much-criticised test of Pothier.

Previous attempts to rationalise the cases on this topic have equated mistake as to identity with a positive intention to make a contract with a person other than the one with whom the contract at issue apparently has been concluded. Thus Mr. Tylor [1] has argued that an apparent contract with B is void, not because A did not intend to deal with B, but because he intended to deal with C, a third identifiable party. Similarly Dr. Cheshire and Mr. Fifoot state that "An agreement apparently concluded between A and B is a nullity on the ground of mistaken identity, if it is proved: (i) that A did not intend to contract with B but with C; and (ii) that this fact was known, either actually or inferentially, to B." [2]

Objections to the accepted test

With all deference to the learned writers, it is submitted that this approach to the problem is wrong. First, it confuses a method of proving mistake with the fact of mistake itself. Mistake does not lie in proof of an intention to deal with C, but rather in the absence of an intention to deal with B, *i.e.*, lack of the consent requisite to create the contractual tie. The introduction of the third identifiable person is merely useful as a method of proving the fact of mistake (*i.e.*, no intention to deal with B) and must not be regarded as the basis of mistake, for it is wrong to regard a method of proving a fact as equivalent to the fact itself.

Secondly, it imposes artificial limits to the doctrine of mistake, with the result that half the decided cases on the subject have to be rejected. Thirdly, it results in some curious anomalies. Thus if A consistently refuses to deal with B, but B finally obtains the

[1] 11 M.L.R. 257 at p. 260. See also Dr. Goodhart 57 L.Q.R. 228 at pp. 232, 241–2.
[2] Cheshire and Fifoot, *Law of Contract*, 3rd ed., at p. 197.

required goods by the use of a false name on a mailed order, the contract cannot be held void for mistake unless that false name represents a third identifiable person. Yet it might be apparent to any reasonable man in the position of B that A had no intention of dealing with him. Again if A expressly refuses to deal with B, but B later obtains the required goods by the use of a false moustache, while the parties are *inter praesentes*, two cases must be distinguished. If B disguises himself to resemble C, then the contract will be held void on the ground that A intended to deal with C and not with B. But if B merely conceals his identity by the use of a false moustache, then the contract cannot be held void for mistake since there is no other identifiable person with whom A could have intended to contract.[3] In both cases it may be perfectly clear that A did not intend to deal with B, yet in the second example a court is bound to hold that A intended to make this contract. Such a conclusion appears artificial and is merely reached by self-imposed limitations on the doctrine of mistake.

Moreover, it is submitted, this attempt to equate mistake with an intention of dealing with C and not with B gains no concrete support from decided cases. It can be reconciled with two or three nineteenth-century decisions,[4] but in all of these the positive intention to deal with C is merely used as a method of disproving an intention to deal with B, and there is no suggestion that it is the only method of doing so.

The proposed new test

The present argument is, therefore, that the essence of mistake as to the person is not to be found in the question: "With whom did A intend to contract?" but rather by asking: "Did A intend to contract with B, with whom he has apparently entered into legal relations?" The court in any given case is always required to adjudicate on the validity of an apparent contract between A and B and can only hold such a contract void if it is satisfied that A did not intend to make this contract with B, and that B was aware of the fact. If the problem of mistake is viewed from this aspect, the difficulties raised by such cases as *Phillips* v. *Brooks*[5] and *Sowler* v. *Potter*[6] are not so great as they might appear at first sight.

By what methods can such mistake be proved? The most obvious method is by showing that B was well aware that A intended to deal with C, *and with C only*, for this effectively negatives an intention to deal with B. This is the line adopted in *Cundy* v. *Lindsay*.[7] A second method is to prove that A had no intention of contracting with anyone and, therefore, did not intend to deal

[3] See Dr. Goodhart in 57 L.Q.R. at p. 242.
[4] Such cases as *Cundy* v. *Lindsay* (1873) 3 App.Cas. 459; *Hardman* v. *Booth* (1863) 1 H. and C. 803; *Baillie's Case* [1898] 1 Ch. 110.
[5] [1919] 2 K.B. 243.
[6] [1940] 1 K.B. 271.
[7] See note 4, *supra*.

with B. This position is exemplified in the case of *Heap* v. *Motorists' Advisory Agency, Ltd.*[8] A third suggested method which has, as yet, not come before the courts, is by proof that A has expressly indicated to B that he will not deal with him, and then subsequently appears to have entered into such a contract as the result of a trick. If a reasonable man in the position of B would conclude that A had no intention of dealing with B, but that the apparent contract had resulted from some artifice on B's part, such as a mailed order under an assumed name, or a disguise while *inter praesentes*, then there is obviously no consent to the contract on the part of A. The express refusal plus the deliberate concealment of identity is clear objective proof of that lack of consent. Finally, if the present argument be correct, mistake can be established if, by the use of any other evidence, A can prove to the satisfaction of the court that he did not intend to contract with B, and that B was aware of the fact.[9]

Conversely a plea of mistake will fail where the mistake is as to attribute and not identity. If a person intends to deal with an identifiable party it is irrelevant that he would not have been willing to do so if he had been aware of the other's reputation or bank balance.[10] Secondly, mistaken motive is irrelevant, since it is personal to the offeror and in no way affects a clear intention on the part of A to deal with B. "I intended to deal with him because . . . ," reveals the intent necessary to validate the contract. Thirdly, an offer may be framed in such a way as to indicate that A is waiving his right of selection, and that anyone fulfilling the necessary requirements may accept. Whether an offer falls within this category is purely a question of fact, depending on the circumstances of each case, but the most obvious example of an offer open to all the world is an offer of reward for information received.

The test applied to the cases

How far then can this approach be substantiated by decisions and dicta from cases expressly dealing with mistake as to identity in the formation of contract? It is submitted that the common-law position is based on eleven cases,[11] all decided within a period of ninety-five years, and the present intention is to confine the inquiry to these cases. The obvious starting point in such a survey

[8] [1923] 1 K.B. 577. See *per* Lush J. at p. 585.

[9] As in *Gordon* v. *Street* [1899] 2 Q.B. 641, and *Sowler* v. *Potter* (*supra*).

[10] Or aware of his name, for this too is only an attribute, as pointed out by Dr. Glanville Williams in 23 Can.B.R. 271.

[11] These cases are: *Boulton* v. *Jones* (1857) 27 L.J.Ex 117; *Hardman* v. *Booth*; *Cundy* v. *Lindsay*; *King's Norton Metal Co.* v. *Edridge* (1897) 14 T.L.R. 98; *Baillie's Case*; *Gordon* v. *Street*; *Phillips* v. *Brooks*; *Said* v. *Butt* [1920] 3 K.B. 497; *Lake* v. *Simmons* [1927] A.C. 487; *Sowler* v. *Potter*; and *Dennant* v. *Skinner* [1948] 2 K.B. 164. It is interesting to note that Pothier's test was not mentioned in the first five cases but, after being introduced in *Gordon* v. *Street*, it has been consistently cited with approval in the remaining five cases.

is the group of cases comprising *Cundy* v. *Lindsay*, *Hardman* v. *Booth* and *Baillie's* case, since these decisions have met with general approval.

Cundy v. *Lindsay*

In *Cundy* v. *Lindsay* [12] the court had to decide whether a valid contract existed between Lindsay and Blenkarn under which the property in the goods passed to Blenkarn and then on to Cundy. If there is no valid contract, then Cundy can have no claim to the goods. So *per* Lord Cairns, " the question . . . really becomes the very short and simple one. . . . Was there any contract which, with regard to the goods in question in this case, had passed the property in the goods from Messrs. Lindsay to Alfred Blenkarn? " [13] The court is not concerned with the existence of a contract between Lindsay and Blenkiron & Co., or with an intention on the part of Lindsay to deal only with Blenkiron & Co., except in so far as such facts prove an absence of consent to deal with Blenkarn. It is noticeable throughout the judgments that stress is continually laid on the fact that Lindsay did not intend to deal with Blenkarn. In the words of Lord Cairns, " I ask the question, how is it possible to imagine that in that state of things any contract could have arisen between the respondents and *Blenkarn* the dishonest man? Of him they knew nothing, and of him they never thought. *With him they never intended to deal.*" [14] Moreover, in the remaining speeches of Lords Hatherley and Penzeance the same line of attack is evident. Thus *per* Lord Hatherley, " The sale, if made out upon such a transaction as this, would have been a sale to the Blenkirons of Wood Street, if they had chosen to adopt it, and to no other person whatever—not to this Alfred Blenkarn, with whom the respondents had not, and *with whom they did not wish to have, any dealings whatever.*" [15] Again *per* Lord Penzeance, " In the present case Alfred Blenkarn pretended that he was, and acted as if he was Blenkiron & Co., with whom alone the vendors intended to deal. *No contract was ever intended with him.*" [16]

Hardman v. *Booth*

The position in *Hardman* v. *Booth* [17] is very similar to that in *Cundy* v. *Lindsay* in that the defendant's title to the goods depends on the existence of a valid contract between the plaintiff and Edward Gandell. In dealing with the validity of this contract the court again stresses the absence of an intention to deal with

[12] (1878) 3 App.Cas. 459.
[13] *Ibid.*, at p. 464. See *per* Lord Hatherley at p. 466.
[14] (1878) 3 App.Cas. at p. 465. The italics in this and following citations are mine.
[15] *Ibid.*, at p. 467.
[16] *Ibid.*, at p. 465.
[17] (1863) 1 H. and C. 803.

Edward Gandell rather than with the positive intention to deal with Gandell and Co. In the words of Channell B., "it is evident that the plaintiffs believed that they were dealing with Gandell and Co., and *never meant to contract with Gandell and Todd.*" [18] This view is supported by Wilde B. when he remarks that "it is equally clear that there was no sale to Edward Gandell, *because the plaintiffs never intended to deal with him personally.*" [18]

It is interesting to note the interpretation placed on this decision by the House of Lords in *Cundy* v. *Lindsay*, where the case is not only cited with approval, but expressly followed. In the opinion of Lord Hatherley the case is "completely within the authority of *Hardman* v. *Booth*, where it was held that there was no real contract between the parties by whom the goods were delivered, and the concoctor of the fraud who obtained possession of them, *because they were not to him sold.*" [19] Again *per* Lord Penzeance, "the court held that there was no contract . . . with Edward Gandell who had ordered the goods, *as the plaintiffs never intended to deal with him.*" [20]

The remaining decision on this point, *Baillie's case*,[21] neither adds to nor detracts from the present argument. Baillie intended to join society A, but had been deceived into joining society B in the belief that it was society A. The judgment in this case is too brief to be of any great value except in showing that Wright J. concerned himself entirely with the validity of the apparent contract between Baillie and society B.[22] Nevertheless, as the trial judge expressly bases his judgment on *Cundy* v. *Lindsay* the above-quoted dicta from that case gain added weight.

These three cases represent the only decisions on mistake as to identity which have so far met with universal approval, and in each of them appears the third identifiable person. Yet, if the present argument is well founded, the decisions turn on a lack of intention to deal with B rather than on a positive intention to deal with C.

Boulton v. *Jones*

More difficulty is encountered in the early case of *Boulton* v. *Jones*.[23] Here the defendants, who were unaware of the change in ownership of the business, refused to pay for goods supplied by the plaintiff on the ground that they intended to deal only with Brocklehurst, the former owner of the business, since they had a

[18] *Ibid.*, at p. 808.
[19] (1878) 3 App.Cas. at p. 467.
[20] *Ibid.*, at p. 471.
[21] [1898] 1 Ch. 110.
[22] So *per* Wright J. at p. 114, "Under these circumstances is Baillie to be allowed . . . to say that he never contracted with the company now in liquidation? . . . The evidence satisfies me that there never was a contract between Baillie and the company."
[23] (1857) 27 L.J.Ex. 117.

set-off against him. In order to defeat an action for goods sold and delivered, the defendants had to prove that no contract existed between themselves and the plaintiff, *i.e.*, that they never intended to deal with the current owner of the business, and that he was aware of the fact. On the facts of the case, the court found that the intention was to deal with Brocklehurst alone, and that consequently there was no intention to enter into a contract with the plaintiff. Pollock C.B. holds that "the rule of law is clear, that if you propose to make a contract with A, then B cannot substitute himself for A without your consent and to your disadvantage."[24] Again *per* Channell B., "The plaintiff is clearly not in a situation to sustain this action, for there is no contract between himself and the defendant."[25] Once more the same formula is used, but there is again no suggestion throughout the judgments that proof of an intention to deal with another identifiable person is the only method of establishing mistake.[26]

The remaining seven cases on this subject have aroused considerable academic discussion and criticism. The dicta of A. L. Smith L.J. in *Gordon* v. *Street* have been condemned as unnecessary, the cases of *Sowler* v. *Potter* and *King's Norton Metal Co.* v. *Edridge* are considered irreconcilable, *Phillips* v. *Brooks* is said to be wrongly decided, and the remaining cases are censured since their judgments rely to a large degree on Pothier's test. The present contention is, however, that all these cases can be reconciled if the suggested test for mistake is accepted, and it is recognised that mistake depends on proof of a lack of consent to make the apparent contract, which is known to the other party.

The true purpose of Pothier's test

Much confusion on this point has arisen from a misunderstanding of the true nature of Pothier's test :

> "Does error with regard to the person with whom I contract destroy the consent and annul the agreement? I think that this question ought to be decided by a distinction. Whenever the consideration of the person with whom I am willing to contract enters as an element into the contract which I am willing to make, error with regard to the person destroys my consent and consequently annuls the contract. . . . On the contrary, when the consideration of the person with whom I thought I was contracting does not enter at all into the contract, and I should have been equally willing to make the contract with any person whatever as with him with whom I thought I was contracting, the contract ought to stand."[27]

[24] *Ibid.*, at p. 118.
[25] *Ibid.*, at p. 119.
[26] It is not proposed to deal with the vexed question of the importance of the set-off, although this is referred to in three of the judgments. The present submission is that the decision on the objective presence or absence of consent is purely a question of fact depending on the knowledge of the offeree.
[27] Pothier, *Traité des Obligations*, s. 19.

Admittedly the test is worded ambiguously, but it must be noted that it requires "the consideration of the person" to enter as "an element into the contract," and thus expressly excludes motive which is only to be found in the mind of the party concerned.[28] The more important point, however, is that the test does not attempt to define mistake as to identity but merely outlines the conditions in which mistake can operate. Pothier makes no effort to explain in terms what amounts to "error with regard to the person," and consequently such "error" can only be defined with reference to common law decisions on the subject. The test amounts to no more than an essential pre-requisite to proof of mistake, and not to a test for the purpose of establishing the presence of mistake.[29] Such a test is equally applicable to the *Cundy* v. *Lindsay* type of case, where it is satisfied by proof of an intention to deal with one particular person, and with that person *alone*.[30] The present contention is, therefore, that the purpose of Pothier's test is neither to define operative mistake, nor to establish a special type of personal contract, but merely to state that mistake as to identity will not operate to annul an apparent contract unless the plaintiff can prove that "consideration of the person" formed "an element in the contract." It operates as a negative test, for if the party alleging mistake satisfies the positive section of the test he has still to prove that mistake exists, and to do so must rely on the common law definition of mistake, *i.e.*, prove that B was aware that he did not intend to contract with him.

Gordon v. *Street*

With this distinction in mind, the remaining cases on mistake can now be examined. In *Gordon* v. *Street*[31] where the plaintiff had been induced to borrow money from a notorious moneylender, the Court of Appeal held the contract voidable for fraud, but A. L. Smith L.J. was of the opinion that it was also void for mistake.[32] He applied Pothier's test, not to discover whether operative mistake existed, but merely to decide whether the defendant could be allowed to plead mistake. "Now the advertisement . . . points out that Addison, with whom the defendant thought he was contracting, was not as ordinary loan offices were, and that he traded at one-tenth of the interest charged elsewhere, and this appears to me to afford evidence that with a man trading as Addison said

[28] *Pace* the example in Cheshire and Fifoot, 3rd ed., at p. 197.

[29] The argument is not that A would have been willing to make another similar contract with another individual, but that in this particular case A is indifferent to the identity of B, with the result that he is debarred from alleging later that he did not intend to deal with B personally.

[30] The word "alone" is vital. See *per* Martin B. in *Boulton* v. *Jones* at p. 119.

[31] [1899] 2 Q.B. 641.

[32] The remaining members of the court, Rigby and Vaughan-Williams L.JJ. concurred in the judgment and presumably in the *obiter dicta*.

he did, the defendant was willing to contract, and that the consideration of the person did enter into the contract." [33]

Having held that the defendant was concerned with the identity of the moneylender, A. L. Smith L.J. then proceeds to hold that in fact the defendant had no intention of dealing with Gordon. "The defendant stated, and the jury believed him, that if he had known that Addison was Gordon he would not have answered his advertisement or signed the promissory note, and that he would have done anything rather than go to Gordon. . . . I have not the slightest doubt that the findings of the jury on the questions left to them upon this part of the case were absolutely accurate, and should be upheld." [34] It was also obvious from the extracts quoted from Gordon's correspondence,[34] that Gordon was well aware that the defendant did not intend to contract with him. Although the remarks quoted above are no more than *obiter dicta*, it is obvious that A. L. Smith L.J. based mistake on an intention not to contract, and not on a mere application of Pothier's test.

Said v. *Butt*

It is not intended to lay stress on the judgment in *Said* v. *Butt* [35] for, as Dr. Goodhart has pointed out,[36] the case deals with the position of an undisclosed principal rather than with the point of mistake. The trial judge, however, based his judgment on the ground of mistake and so brief reference must be made to the case. The facts were that A wanted a ticket for the first night of a show at B's theatre but was aware from past experience, including an express refusal, that B would not sell him one. He therefore employed C to purchase the ticket for him, but was subsequently refused admission to the theatre. McCardie J. ignored the consequences of recognising A as an undisclosed principal, and treated the facts as though A had disguised himself as C in order to obtain the ticket.

Two points in the judgment must be carefully noted. First, Pothier's test is cited merely to prove that a reasonable man might expect B to be vitally interested in the identity of the purchaser of the ticket, for if he was willing to sell to all comers, how could he allege that he did not intend to sell a ticket to A? So *per* McCardie J., "A first night, therefore, is a special event, with special characteristics. As the plaintiff himself stated in evidence, the management only disposes of first night tickets . . . to those whom it selects." [37] Secondly the judgment concentrated for proof of mistake, not on the fact that B intended to sell the ticket to C,

[33] [1899] 2 Q.B. at p. 647.
[34] *Ibid.*, at p. 648.
[35] [1920] 3 K.B. 497.
[36] 4 C.L.J. 320 at p. 349.
[37] [1920] 3 K.B. at p. 501.

but on the fact that he did not intend to sell it to A, who was well aware of the fact. "I find as a fact . . . that the plaintiff well knew that the Palace Theatre would not have sold him personally a ticket for December 23, 1919."[38] And again, "In my opinion the defendant can rightly say . . . that no contract existed . . . upon which the plaintiff could have sued the Palace Theatre. The personal element was here strikingly present. The plaintiff knew that the Palace Theatre would not contract with him. . . . I hold that by the mere device of utilising the name and services of Mr. Pollock, the plaintiff could not constitute himself a contractor with the Palace Theatre against their knowledge, and *contrary to their express refusal*."[39] If it were not for the presence of the principal-agent relationship, this case would be a perfect example of the third method of proving mistake cited above.

Mistake inter praesentes

More care has to be taken in dealing with mistake cases when the parties are *inter praesentes*. In the most controversial of these cases, *Phillips* v. *Brooks*,[40] the plaintiff had to prove, according to the present thesis, that he did not intend to deal with North. A third identifiable person was present in the person of Sir George Bullough, but the mere introduction of the name of Sir George does not render the contract *ipso facto* void for mistake, for name is no more than an attribute. Consequently the trial judge had to decide whether the jeweller intended to deal exclusively with Sir George Bullough, or intended to deal with the customer before him, though believing him to be Sir George. Only in the first case will the contract be void for mistake, and Horridge J. is not of the opinion that such an exclusive intention exists. "I have . . . come to the conclusion that, although he believed the person to whom he was handing the ring was Sir George Bullough, he in fact contracted to sell and deliver it to the person who came into his shop, and who was not Sir George Bullough but a man of the name of North, who obtained sale and delivery by means of the false pretence that he was Sir George Bullough."[41]

This view of the judgment is taken by Lord Haldane in *Lake* v. *Simmons*[42] where he states: "Horridge J. found, as a fact, that though the jeweller believed the person to whom he handed the jewel was the person he pretended to be, yet he intended to sell to the person, whoever he was, who came into the shop and paid the price, and that the misrepresentation was only as to payment. There was, therefore, *consensus* with the person identified by sight and hearing." It is submitted that *Phillips* v.

[38] *Ibid.*, at p. 502.
[39] *Ibid.*, at p. 503.
[40] [1919] 2 K.B. 243.
[41] *Ibid.*, at p. 246.
[42] [1927] A.C. 487 at p. 501.

Brooks can be easily reconciled with the decision in *Hardman* v. *Booth* where A, from the outset, intended to deal with Gandell & Co., and never for a moment thought of dealing with the person before him, except as a representative of that firm. The mere fact that both transactions took place *inter praesentes* does not mean that the decisions in both cases should be identical. They are distinguishable in that in *Phillips* v. *Brooks* the trial judge found as a fact that the jeweller intended to deal with the person before him, regardless of his identity, whereas in *Hardman* v. *Booth* the court found as a fact that the plaintiff did not intend to deal with the person before him.

Dennant v. *Skinner*

Phillips v. *Brooks* is expressly followed in the recent case of *Dennant* v. *Skinner*[43] where Hallett J. deals with the problem of mistake not by inquiring whether the plaintiff intended to deal with C, but by discovering whether he had given any proof of an intention not to deal with B. "Now it is agreed . . . that upon a sale by auction a contract is completed on the fall of the hammer. . . . Up to that time Mr. Dennant had not inquired the name of the bidder. He had not concerned himself in any way with the identity of the bidder; he had knocked down the Commer van to the man who had bid, whatever the top bid was, irrespective of the identity of that particular man."[44] Once again the decision on the point of mistake turns on the presence or absence of an intention to deal with the person who alleges the contract to exist. In the present submission the decision in this case is on all fours with that of *Phillips* v. *Brooks*.

Lake v. *Simmons*

Brief reference must also be made to the judgment of Lord Haldane in *Lake* v. *Simmons*.[45] In this case A posed as the wife of B and by this means obtained from a jeweller possession of two necklaces for the purpose of showing them to B and C for their approval. In holding that no contract existed between A and the jeweller,[46] both Lord Haldane and Viscount Sumner emphasise the fact that the jeweller did not intend to deal with A, rather than the fact that he intended to deal with B and C. Thus *per* Lord Haldane, "The appellant thought that he was dealing with a different person, the wife of Van der Borgh, and it was on that footing alone that he parted with the goods. *He never intended*

[43] [1948] 2 K.B. 164. See Hallett J. at p. 169 where he expressly approves the decision.

[44] *Ibid.*, at p. 167.

[45] [1927] A.C. 487.

[46] So *per* Lord Haldane at p. 499, "To entrust to a customer or broker, or broker's customer, as specified in the exception, means a definite contract."

to contract with the woman in question." [47] Again *per* Viscount Sumner, " She was not the person who was to approve or return them—that was Mr. Van der Borgh or Commander Digby. If there was entrusting, it was to one of them." [48] If it be still argued that this decision was only reached by proof of an intention to deal with a third identifiable person, then it is interesting to note that Commander Digby was a figment of Miss Ellison's imagination and had no existence in fact. To whom then, did the jeweller intend to entrust the second necklace, other than to Miss Ellison? [49]

Difficulties raised by Sowler v. *Potter*

There remains the decision in *Sowler* v. *Potter* [50] which has attracted almost universal criticism.[51] To establish a plea of mistake in this case, the plaintiff had to prove, as a question of fact, that she did not intend to lease the premises to the defendant, and that the defendant was aware of the fact. The trial judge, Tucker J., employs Pothier's test not to decide whether mistake exists, but merely as a preliminary before allowing the plaintiff to prove " any mistake . . . with regard to . . . identity." Thus he says " I think that this case of landlord and tenant is clearly one where the consideration of the person with whom the contract was made was a vital element in the contract, and that, therefore, if there was any mistake on the part of the plaintiff with regard to the identity of the person with whom she was contracting, the contract is void *ab initio.*" [52]

Having decided that a reasonable man would expect the plaintiff to be concerned with the identity of the defendant, Tucker J. had then to decide whether in this particular case mistake existed, *i.e.*, had the plaintiff shown a definite intention not to deal with the defendant? Here there had been a request for references, proving that the defendant's identity was not immaterial, but a definite intention not to deal is necessary. The final decision on this point must be one of fact, based on the evidence of each particular case. This line is followed by Tucker J. when he says, " The agent . . . thought . . . that he was entering into a contract

[47] *Ibid.*, at p. 500.

[48] *Ibid.*, at p. 508. See also the speeches of Lord Atkinson at p. 512, and of Lord Blanesborough at p. 514.

[49] The absence of the third identifiable person does not appear to trouble Viscount Sumner at p. 508 when he holds that Ellison " was not the person who was to approve or return them—that was Mr. Van der Borgh or Commander Digby. If there was to be any entrusting it was to one of them. One of these persons was imaginary. The other was not a customer."

[50] [1940] 1 K.B. 271.

[51] The late Professor Winfield approved of the decision, and also of the *obiter dicta* of A. L. Smith L.J. in *Gordon* v. *Street* in the twelfth edition of Pollock on *Contract* at p. 381, note 10b.

[52] [1940] 1 K.B. at p. 275.

with some person other than the Mrs. Ann Robinson who had been convicted. . . . He believed that whoever it was with whom he was contracting, it was not the Mrs. Ann Robinson who had been convicted of this offence a very short time beforehand.[52] This is not an allegation that the plaintiff would not have dealt with the defendant if she had been aware of her reputation, but that she never intended to deal with this identifiable person of whose existence she was aware. Whether or not Tucker J. was correct in reaching this conclusion on the facts may be doubted, but there can be no doubt that he is personally satisfied that the plaintiff did not intend to make the contract with the defendant, and bases his decision on that ground. Any error on his part would not be one of principle, but one of applying principle to facts, for the present submission is that criticism based on the absence of a third identifiable person is unjustified.

It is interesting to note that Tucker J. based his decision on the *obiter dicta* in *Gordon* v. *Street*, and outlined the facts of that case in the manner suggested by this article. "I think that the facts are, therefore, very similar to the facts in *Gordon* v. *Street*. . . . It is to be observed in this case that the defendant . . . thought he was not contracting with a known person called Gordon of whose existence he was aware."[53] Once again mistake is equated with an intention not to deal with an identifiable person.

A possible solution

It has frequently been suggested that the decision in *Sowler* v. *Potter* is irreconcilable with that in *King's Norton Metal Co.* v. *Edridge*,[54] and on that ground alone is wrongly decided. A brief glance at the facts of the latter case will show that this suggestion is misleading. In the opinion of the Court of Appeal the contention that the plaintiff did not intend to deal with Wallis failed because "The question was, with whom, upon this evidence, which was all one way, did the plaintiffs contract to sell the goods? Clearly with the writer of the letters."[55] The plaintiff could not establish an intention not to deal with Wallis by proving an exclusive intention to deal with Hallam and Co., for the two were identical. The evidence in fact proves the opposite, for the facts show that there had been previous dealings between the parties, and consequently the court would either have to hold that the plaintiff never intended to make any of the contracts with Wallis, or that he intended to make them all. For if the previous contracts were good, the plaintiff in this case obviously intended to deal with the person who had made the other contracts. So *per* A.L. Smith L.J., "this

[53] (1939) 4 All E.R. at p. 481.
[54] (1897) 14 T.L.R. 98.
[55] *Ibid.*, at p. 99.

was nothing more than a long firm fraud. Did anyone ever hear of an attempt being made by a person who had delivered his goods to a long firm to get his goods back on the ground that he had made no contract with the long firm?"[55] The plaintiff failed, therefore, because the facts proved conclusively that he intended to deal with Wallis, whereas in *Sowler* v. *Potter* the trial judge was satisfied that the plaintiff in that case did not intend to deal with Mrs. Robinson. As A. L. Smith L.J. delivered the only recorded judgment in *Edridge's* case and also the much criticised dicta in *Gordon* v. *Street*, he would not appear to consider those two cases irreconcilable.

Conclusions

From the above survey of decided cases, it is submitted that the following conclusions can be drawn :—

1. Whenever it is alleged that an apparent contract between A and B is void for mistake, the court has to decide on the validity of that particular contract. Where the alleged mistake is as to identity, the vital point at issue is whether A intended to make *this* contract with B, and not whether he intended to make *another* contract with C.

2. If it is apparent that A is willing to deal with the physical entity B irrespective of his identity, then he cannot be allowed to plead mistake, even though he believed B to be C. Thus to the tobacconist, who is willing to sell his cigarettes over the counter to all customers, it is important that he should deliver the cigarettes to the same physical entity who tendered the price, but it may be immaterial to him whether that physical entity represents Lord X or Mr. Y. In such a case the tobacconist cannot later treat the contract as void by proving that he thought he was dealing with Lord X, when in fact the physical entity before him was Mr. Y. He is prevented from doing so by the negative application of Pothier's test. Only if this test is satisfied can he proceed to prove that operative mistake exists.

3. Pothier's test does not attempt to define operative mistake. The test is merely an essential prerequisite to proof of mistake, for if the plaintiff is in no way concerned with the identity of the other party, he cannot be permitted to allege mistake as to identity. The test would exclude, *inter alia*, offers open to the world.

4. Operative mistake lies in proof of an absence of intention to make the apparent contract. In other words, in proof that B was aware that A did not intend to contract with him, rather than in proof that A intended to contract with C.

5. An intention to contract exclusively with a third identifiable person is merely a method of proving mistake, and at least three other methods exist. They are :—

(a) Proof of an absence of intention to deal with anyone.
(b) Proof of an express refusal to deal with an identifiable person with whom a contract has later apparently been concluded.
(c) Any other evidence which will satisfy a jury, as a question of fact, that B was aware that A did not intend to contract with him.

6. The contention that the " third identifiable person " method is the only possible method of proving mistake as to identity, cannot be supported for a variety of reasons. First, it is an artificial limitation of the doctrine of mistake which finds no support in decided cases. Secondly it rules out the majority of cases as having been wrongly decided. Thirdly, it amounts to no more than an elementary principle of offer and acceptance that no one can accept an offer except the person to whom it is addressed, thus making nonsense of the detailed treatment given to mistake in textbooks. Finally it leads to the doubtful conclusion that, although the jury finds as a fact that A did not intend to deal with B, the court must hold that such an intention existed if there is no other identifiable person with whom A could have intended to contract.

The flaw in this argument lies in treating the intention to contract as inviolable. To argue that A must have intended to contract with someone, and consequently must have intended to contract with B if no third party exists, is to overlook the fact that proof of mistake as to identity destroys the apparent consent or intention. Mistake lies in the fact that, although there was an apparent intention to make this contract, no such intention in fact existed.

In conclusion reference must be made to two passages from the works of academic lawyers who support the " third identifiable person " approach to mistake. The opening paragraph in the section dealing with mistake as to identity in Anson's *Law of Contract* supports the present thesis when it says, " We may start with the proposition that a person cannot constitute himself a contracting party with one he knows or ought to know has no intention of contracting with him." [56]

Finally the present argument cannot better be summarised than by quoting the following passage from an article written in 1932 by Professor Goodhart and Mr. Hamson. " It is an axiom that in a transaction between A and B, if A knows that B will not (from any motive) contract with him, but nevertheless attempts to steal B's consent to a contract, he cannot, having purported to steal B's consent, pretend that there is a contract between himself and B : on any view of contract, because neither is there consent, consent not being capable of being stolen, nor has A any ' reasonable expectation ' that consent was given by B to that contract." [57]

[56] Anson, *Law of Contract*, 19th ed., at p. 153.
[57] 4 C.L.J. 320 at p. 347.

The present submission is that once B has proved to the satisfaction of the court that he did not intend to make this apparent contract with A, and that A was aware of the fact, then the contract is void for mistake regardless of whether B intended to deal with a third identifiable person. It is wrong to confuse a method of proving mistake with the fact of mistake itself.

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THE PRESUMPTION OF DEATH

THE disappearance of a person leaving no trace behind gives rise to curious and baffling problems in various branches of the law. The authorities show that these problems are by no means as easy to resolve as the books on Evidence suggest.[1] The reason for this complexity is that an unresolved conflict of policies underlies this topic and indeed the whole subject of presumptions. On the one hand there is the dislike of being forced into conclusions of fact by rules of law rather than logic; on the other hand there is the binding necessity of giving some decision in each case, even though the evidence is logically insufficient. Of this conflict there is no simple or uniform resolution. Both the fact giving rise to the presumption—the basic facts [2]—and the presumed facts [2] differ according to the type of case before the court.

THE BASIC FACTS

(1) "*Absent*"

The view that the propositus must be absent "beyond the seas" no longer commands much support.[3] But though a person may be absent in any place, the question remains—absent from where? As a general rule, absence from the last place of residence must be proved.[4] But if it is not known where the propositus last resided it is submitted that absence from the last place in which he was heard of by the witnesses available in the proceedings should be sufficient, even though it is probable that he may subsequently have had some other but unknown place of residence.[5] This difficulty cannot arise where a petition for presumption of death and dissolution of marriage is presented under section 16 of the Matrimonial Causes Act, 1950, for the absence required by subsection (2) is absence from the petitioner, not from any particular place.

[1] *e.g.*, Best, *Evidence*, 12th ed., p. 348; Stephen, *A Digest of the Law of Evidence*, 12th ed. Article 108; Phipson, *Evidence*, 9th ed., p. 701; Wills, *Evidence*, 3rd ed., p. 51; Cockle, *Cases and Statutes on Evidence*, 8th ed., p. 30; Nokes, *An Introduction to Evidence*, pp. 59–60.

[2] The terms "basic facts" and "presumed facts" are borrowed from the American Law Institute's Model Code of Evidence, Rule 701.

[3] It still appears in Wills on *Evidence* where it is said that absence abroad gives rise to a presumption of law; but "if a person is merely lost sight of" there is only a presumption of fact (pp. 51–52). The last judicial expression of this view which the writer has found is in *Allman & Co.* v. *M'Cabe* [1911] 2 I.R. 398, *e.g.*, at p. 426.

[4] *M'Mahon* v. *M'Elroy* (1869) 5 I.R. Eq. 1.

[5] See *Doe* d. *Lloyd* v. *Deakin* (1821) 4 B. & Ald. 433; *Allman & Co.* v. *M'Cabe* [1911] 2 I.R. 398.

(2) "*Not heard of for seven years*"

The effect of the decision of the House of Lords in *Prudential Assurance Co.* v. *Edmonds*[6] seems to be that a person is not "heard of" if no *reliable* information concerning him is received. Conversely, it is clear that the mere fact that a person has not been heard of is not sufficient if news of him could have been obtained by the exercise of reasonable diligence. Just as the person who seeks to set up the presumption is not bound to listen to idle gossip, so also he must not shut his eyes to possible sources of reliable information.

It is important to remember that the not hearing of a person is a basic fact of the presumption of death as expounded by the judges. Thus evidence that the propositus has been heard of by those likely to have heard of him is not, as is sometimes said,[7] evidence which rebuts the presumption but evidence which prevents it from arising. It would be a rebuttal of the presumption to show, after the basic facts had been established, that the propositus had been heard of by persons *other* than those likely to have heard of him. The position is different under the "Cestui que Vie Act," 1667,[8] which merely requires the proponent of the presumption to prove absence for seven years. Under the Act, evidence that the *cestui que vie* had been heard of by those likely to have heard of him would operate in rebuttal of the presumption.

This distinction may be of decisive importance in a case where, after all the evidence has been heard, no definite conclusion can be reached on the question whether or not the propositus has been heard of by those likely to have heard of him. At common law, the proponent would lose his case for it is up to him to establish the basic facts of the presumption on a preponderance of probabilities. Under the Act, the result would depend on the view taken by the court as to the procedural effect of the presumption. Broadly speaking, there are two views: (i) that it is up to the opponent of the presumption to disprove the presumed fact on a preponderance of probabilities; and (ii) that it is sufficient for him to raise a doubt as to the existence of the presumed fact.[9] If the first view is correct, then under the Act the proponent would win. If the second view is correct, the result would be the same under the Act as at common law.

(3) "*By those who would have been likely to hear of him*"

It is impossible to lay down any definite rule as to who are the persons who would have been likely to hear of the propositus.

[6] (1877) 2 App.Cas. 487.
[7] *e.g.*, in *Prudential Assurance Co.* v. *Edmonds* (*supra*), *per* Lords Blackburn and Hatherley.
[8] 19 Car. 2, c. 6 (cited in "Statutes of the Realm" as 18–19 Car. 2, c. 11).
[9] For an account of the American controversy on this subject, see S. J. Helman, 22 Can.Bar Rev. 118. See also Lord Justice Denning: 61 L.Q.R. 379; and Mr. Nigel Bridge: 12 M.L.R. 273.

Generally speaking they are his close relations or neighbours.[10] But their evidence is not sufficient if there are circumstances other than death to account for the absence and lack of news. Thus a man who is a fugitive from justice,[11] from creditors,[12] from his family,[13] or from his fiancée [14] cannot be expected to communicate with the persons who, but for such escape, would have been likely to have heard from him. But it is clear that such a fugitive cannot, if there is no positive evidence of his death, be endued with legal immortality.[15] The result in cases of this kind depends on whether the judge is mainly influenced by the dislike of being forced into an arbitrary conclusion, or by the desire to reach some definite result even though the evidence is logically insufficient to warrant it. On the "logical" view, it is necessary, in order to raise the presumption, to follow the fugitive to the place *to which* he fled and to find witnesses there to testify that they have not heard from him. On the "practical" view it is sufficient to take the witnesses from the place *from which* he fled. The latter view is clearly more convenient where, as happens in the majority of cases, no one knows exactly where the fugitive has gone, or where it is impossible to make inquiries at his last known place of residence.[16]

There is indeed some authority for saying that there are two ways of establishing the presumption: (i) by evidence that the propositus did not communicate with those who would have been likely to hear from him *during* the seven years: or (ii) by evidence that *after* seven years an independent search revealed no trace of him.[17] The logic of accepting the second alternative as sufficient by itself would be weak. Generally, the fact to which the law attributes significance is the lack of news during the

[10] See *Doe* d. *France* v. *Andrews* (1850) 15 Q.B. 756.
[11] *Re Harding* (1891) *The Times* Newspaper, May 28, p. 3.
[12] *Wills* v. *Palmer* (1904) 53 W.R. 169.
[13] *Watson* v. *England* (1844) 14 Sim. 28; *Bowden* v. *Henderson* (1854) 2 Sm. & G. 360.
[14] *The Curious Case of William Robertson Lidderdale* (1912) 57 S.J. 3.
[15] If the disappearance is remote enough in time, this fact alone may give rise to the inference, though not to the presumption, that the propositus is dead: *Re Watkins* [1953] 1 W.L.R. 1323. The propositus was taken to be dead twenty-five years after he had deserted his wife, even though no thorough search was ever made for him. A comparison between this case and *Watson* v. *England*, *supra*, shows a considerable change in the judicial approach to these problems.
[16] In *Re Liebeskind* (1952) *The Times* Newspaper, December 11, p. 2, Willmer J. said that absence without news for seven years behind the iron curtain would not give rise to a presumption of death. He was able, however, to infer death (*semble*) as the propositus was a Jewess resident in German controlled territory at a time when Germany was engaged in large-scale extermination of the Jews. In practice it is sufficient for probate purposes to adduce *some* evidence of the death of a person who has disappeared behind the iron curtain, *e.g.*, a letter written by a relation of the propositus. Even if there is no such evidence probate is usually granted if the applicant proves that inquiries through the appropriate embassy or through the International Red Cross have proved fruitless. This practice in effect involves sacrificing logic to convenience.
[17] *Doe* d. *France* v. *Andrews* (1850) 15 Q.B. 756; *cf. Tweney* v. *Tweney* [1946] P. 180.

whole of the period of disappearance. But where it is impossible to produce evidence of this nature the demands of convenience appear to run counter to the requirements of logic. In these cases —and in these cases only—a good case can be made for giving effect to the second alternative method of setting up the presumption.

Here again it is necessary to distinguish between the judicial presumption and its statutory variation under the Matrimonial Causes Act, 1950, s. 16. Subsection (2) provides that a decree of presumption of death and dissolution of marriage may be pronounced if the petitioner can prove (i) that the other party has been continually absent from the petitioner for seven years or more; *and* (ii) that the petitioner has no reason to believe that the other party has been living within that time.[18] These requirements are certainly in one respect less stringent and possibly in one respect more stringent than those of the judicial presumption.

They are less stringent in that it is sufficient to prove absence from the petitioner.[19] The requirements of the subsection are apparently more stringent than those of the judicial presumption in that they impose on the proponent the duty of proving a difficult negative proposition to satisfy condition (ii). It appears to be *sufficient* to satisfy condition (ii) to show that those who would in the normal course of things have heard of the respondent have not heard of him.[20] But such evidence is not, on the wording of the subsection, *essential*. The petitioner may have no reason to believe the other party to be alive even though he is totally out of touch with the persons who would have been likely to hear from the other party.[21] In such a case a decree could be made on evidence merely that inquiries and advertisement for the respondent had yielded no result. If the petitioner thus satisfies the requirements of the subsection, evidence of persons who are likely to have heard of the absent spouse is evidence in rebuttal of the presumption—not an attack on the basic facts. And in this case, at least, it can be said with certainty that this difference is vital, for once the basic facts of the presumption are established the court can pronounce a decree

[18] Matrimonial Causes Act, 1950, s. 16 (2), re-enacting in identical terms Matrimonial Causes Act, 1937, s. 8 (2). It has been said that this enactment "was intended to provide a substantive remedy on proof of facts which had hitherto provided a defence to a charge of bigamy": *per* Merriman P. in *Jones* v. *Jones* (1938) (unreported), cited in *Parkinson* v. *Parkinson* [1939] P. 346, 351. But this is inaccurate. Of the two facts which the petitioner must prove under section 16 (2) the *accused* in a bigamy trial need only prove the first to establish the defence to which the proviso to section 57 of the Offences Against the Person Act, 1861, gives rise. It is the prosecution which must then prove that the accused knew of the life of the other spouse. It is not sufficient for the prosecution to prove that the accused "had no reasonable ground for believing him to be dead": *per* Cave J. in *R.* v. *Tolson* (1889) 23 Q.B.D. 168, 183; *cf. R.* v. *Curgerwen* (1865) L.R. 1 C.C.R. 1.

[19] In practice this distinction is only important where the evidence of inquiries set out in the affidavit in support of a petition under this section is challenged.

[20] As in *Parkinson* v. *Parkinson* [1939] P. 346.

[21] Thus even a person who has deserted and deliberately concealed himself from the other party can obtain a decree under this subsection: *ibid.*, at p. 352.

even though the question of the death of the other party is a matter of complete uncertainty.[22] Under this subsection, therefore, the first of the two views stated above as to the procedural effect of establishing the basic facts of a presumption prevails : it will not do merely to raise a doubt as to the existence of the presumed fact; its non-existence must be established on a preponderance of evidence.

The Presumed Facts

It is, at the outset, essential to distinguish from cases of true presumption two types of cases which use the machinery of a seven years' rule for other purposes than to arrive at the conclusion of fact that a person is dead. In these cases there is no presumed fact.

(i) Applications for leave to swear to the death of a disappeared testator or intestate are frequently granted by the Probate Court. In such cases the court does not strictly presume death—it merely gives licence to swear to a matter which may or may not be true.[23] In granting such leave, however, the court is governed broadly by the principles that govern the judicial presumption of death generally.[24] It is sometimes said that, for this purpose, the Probate Court "presumes" death after short absence[25] but such cases are best explained on the footing that the evidence gives rise to a logical probability of death. They are cases of inference rather than of presumption.

(ii) Section 57 of the Offences against the Person Act, 1861, after defining the felony of bigamy, continues :

> "Provided that nothing in this section shall extend . . . to any Person marrying a Second Time whose Husband or Wife shall have been continually absent from such Person for the Space of Seven years last past, and shall not have been known by that Person to be living within that Time. . . ."

Now it has been said that "The legislature, by this proviso, sanctions a presumption that a person who has not been heard of for seven years is dead"[26]; but the whole point of the proviso is that the accused escapes the penalty for bigamy even though the other spouse is still proved to be alive. Indeed, unless the life of the other spouse is first established the prosecution fails *in limine*.[27]

[22] *Ibid.*, at p. 353.
[23] See Breslauer, 10 M.L.R. at p. 123.
[24] Except as to the vexed question of time of death. In applications for leave to swear to the death of a person for probate purposes, death is usually taken to have occurred at or about the time of disappearance. But the fixing of the date in these cases is of purely formal importance. It has no bearing on the substantive rights of the parties: see *Lambe* v. *Orton* (1859) 29 L.J. Ch. 286.
[25] Cockle, *op. cit.*, at p. 33; Phipson, *op. cit.*, at p. 701.
[26] *R.* v. *Lumley* (1869) L.R. 1 C.C.R. 196, 199; *R.* v. *Tolson* (1889) 23 Q.B.D. 168, 192.
[27] *R.* v. *Lumley* (*supra*).

In the cases where there is a genuine presumption, this much can be said with certainty, that the presumed fact is the death of the propositus. But the legal consequences which flow from the death of a person depend not only on the fact that he died but also on the time at, and the circumstances in, which he died. The question is whether the presumption of death gives any guidance as to these matters. Here again there is a cleavage between those who favour a " logical " and those who favour a " practical " approach. Those who adopt the former tend to restrict the operation of the presumption within the narrowest possible limits. Those who adopt the latter approach recognise that the presumption is of comparatively small practical value if it serves to ascertain nothing but the bare fact of death and are therefore prepared to use it as an aid in determining those circumstances attending death which are of decisive legal significance.[28]

(1) *Time of death*

This is the problem which gives rise to the greatest difficulty and difference of opinion. It is as well first to clear the ground by examining the cases in which there is circumstantial evidence of the time of death. The principle of these cases appears vividly from the following example :

> " Suppose a person intending to return home at ten o'clock at night does not appear, there is no presumption that he is dead. But if after a week he is found with his skull broken in a wood, you can then conclude that he was killed before ten o'clock on the night on which he disappeared." [29]

It is immaterial whether, as in the above example, the fact of death is established by evidence, or whether it is established by the presumption of death.[30] In these cases the perfectly logical result is reached that, although the fact of death may not be established till the expiration of seven years, it is then possible to " look back " and inquire into the circumstances with a view to determining the additional fact of the date of death.[31]

The most serious difficulties arise in cases of " pure " presumption, where there is no evidence at all as to the time of death. In such cases it is no doubt tempting to put the matter thus : A disappeared at such and such a time; this disappearance is now (*i.e.*, at the time of litigation) more than seven years past; is it

[28] Since the solutions reached differ according to the nature of the issue, reports which merely state the fact of disappearance and the conclusion drawn from it, without stating the issue, are virtually useless; *e.g.*, *Webster* v. *Birchmore* (1807) 13 Ves.Jun. 362; *Re Thompson* and *Re Callan* (1905) 39 Ir.L.T.J. 372.

[29] *Hickman* v. *Upsall* (1876) 4 Ch.D. 145, 149.

[30] *Re Beasney's Trusts* (1869) L.R. 7 Eq. 499. Hall V.-C. in this case talks in terms of presumption, but the case is better regarded as one of inference.

[31] *Cf.* on this point *Hickman* v. *Upsall* (1875) L.R. 20 Eq. 136. This case was several times litigated. *Cf. Webster* v. *Birchmore* (1807) 13 Ves.Jun. 362; *Deakin* v. *Deakin* (1869) 33 J.P. 805.

possible, then, to fix any definite date for A's death? This generalised type of inquiry, however, leads to confusion. The only profitable inquiry is one that sets the disappearance in the context of the particular issue and fixes attention not on the time of litigation but on the date at which death must be proved to have occurred. This may be illustrated by a series of examples taken from different branches of the law.

(a) *Succession.* Suppose that A disappeared in 1940 and B died in 1945 leaving property to A. The question now is whether A survived B or whether his legacy has lapsed. Some of the older authorities lay down that, as A is not presumed to be dead till the end of the seven years, he must during that time be presumed alive.[32] Others proceed on the view that A's life must be proved to have continued beyond the relevant date by those who base their title on that fact.[33] In the latter group the apparently simple logic of the first group of cases is discarded : the mere fact that a person is not *presumed* dead does not mean that he is *proved* alive. It is the second group of cases that prevailed in *Re Phené's Trusts,*[34] which decided that where the representatives of a legatee base a claim on the fact of his having survived the testator, the burden of proving such survivorship is on the representatives. There is in such cases no presumption of life to aid the representatives. This result has been castigated as an " impotent conclusion " which was " not a solution of the problem but an admission of its insolubility." [35] With respect, it is difficult to see the force of this criticism. In a case like *Re Phené's Trusts* there would appear to be three possible criteria by which the result can be judged : justice, logic, and certainty. Considerations of justice do not appear to weigh more heavily on one side than on the other; logic has insufficient material on which to operate; so that only the demands on certainty remain to be satisfied. The decision in *Re Phené's Trusts* does at least make for certainty. Admittedly, a decision to the opposite effect would make for equal certainty. There would seem to be nothing to choose between the rule in *Re Phené's Trusts* and its converse. All that matters is that the one or the other should be definitely established.[36]

Suppose next a variation of the case put above : A disappears in 1940 and B dies in 1945, but this time it is A who has left

[32] *e.g., Smartle* v. *Penhallow* (1703) 2 Ld. Raym. 994; *Throgmorton* v. *Walton* (1624) 2 Rolle 461; *Thomas* v. *Thomas* (1864) 2 Dr. & Sm. 296; *Re Benham's Trusts* (1867) L.R. 4 Eq. 417; *Lambe* v. *Orton* (1859) 29 L.J.Ch. 286; *Dunn* v. *Snowden* (1862) 32 L.J.Ch. 104.

[33] *e.g., Re Green's Settlement* (1865) L.R. 1 Eq. 288; *Dowley* v. *Winfield* (1844) 14 Sim. 277; *cf. Wing* v. *Angrave* (1860) 8 H.L.C. 183.

[34] (1870) L.R. 5 Ch.App. 139.

[35] *Per* Lord Macmillan in *Hickman* v. *Peacey* [1945] A.C. 304, 321.

[36] If *Re Corbishley's Trusts* (1880) 14 Ch.D. 846 is correct, the converse rule applies to dispositions *inter vivos.*

property to B. In such a case B's claim will fail [37] for, just as in the first case A's representatives were unable to prove that A was alive in 1945, so in the second case B's representatives are unable to prove that A was dead in 1945. At first sight the two cases appear to be inconsistent for the first appears to proceed on the footing that A was not alive in 1945 and the second on the footing that he was then alive. In truth there is no such inconsistency : there is simply no evidence whether A was alive in 1945, so that the rule governing the original incidence of the burden of proof is decisive in each case.

It is frequently said that, whenever a claim is based on survivorship, such survivorship must be proved by "affirmative" evidence.[38] This would seem to preclude the establishment of survivorship by the aid of presumption. Such utterances, however, are to be found largely in cases dealing with the disappearance of a legatee. In this context they are accurate enough : they merely mean that there is no such presumption as is alleged by the representatives of the legatee—that is, no presumption of *life*. But there is nothing to prevent a legatee or his representatives from establishing survivorship by the aid of the presumption of *death* where it is the testator who has disappeared. If A leaves property to B and disappears more than seven years before B's death, then surely B's representatives can invoke the presumption of death to establish B's survivorship. Thus in *Re Westbrook's Trusts* [39] on the disappearance of an intestate his property was divided among such of his next-of-kin as were alive seven years after his disappearance, to the exclusion of those who died before the expiration of the seven years. This decision was criticised by North J. in *Re Rhodes* [40] as being inconsistent with *Re Phené's Trusts*, but, with respect, the learned judge fell into the error of applying reasoning that originated in a case concerned with the disappearance of a legatee to one concerned with the disappearance of an intestate. It is submitted that the principle underlying *Re Westbrook's Trusts* is perfectly sound. There are, it is true, statements in the reports and in the books to the effect that whoever relies on the death of a person *at any particular period* must prove such death [41]; but such statements must be understood to mean *at any particular period within the seven years after the disappearance* if the presumption

37 See *Ommaney* v. *Stilwell* (1856) 23 Beav. 328. There was in that case also some evidence of the testator's survivorship, but it was not very satisfactory. Sir John Romilly M.R. does not in terms base his judgment on the reasoning set out above. The judgment is far from incisive and it is difficult to determine on what principle it was based.

38 *e.g.*, in *Re Phené's Trusts* (1870) L.R. 5 Ch.App. 139, at p. 152.

39 (1873) W.N. 167.

40 (1887) 36 Ch.D. 586.

41 The strongest judicial statement of this view is by Lord Blanesburgh in *Lal Chand Marwari* v. *Mahant Ramrup Gir* (1925) 42 T.L.R. 159, 160–1, *cf.* Stephen, *op. cit.*, Art. 108, Cockle, *op. cit.*, at p. 30.

of death is to be of any use in the field of succession.[42] The first formulation would lead to the result that if A left property to B and then disappeared B could, seven years later, claim that property but if B died eight years later without having yet made his claim a claim by his representatives would fail. This cannot possibly be the law.

Again, it has been sought to reduce the answer to problems of this kind to the following generalisation: "Whoever has to make out a case to establish a title which depends on the fact of either the death or the life of a person must prove that fact."[43] In a restricted sense this is accurate enough. For example, if a reversioner claims property on the death of the tenant for life undoubtedly his claim depends on the death of a person and he must prove it. Conversely, if his claim is opposed on the ground that it is statute-barred he must prove that the tenant for life was alive within the period of limitation[44] and to that extent his claim depends on the life of a person at a certain time. But in other contexts the proposition is so wide as to be utterly useless. Thus, if property is left to A should X survive a certain date but to B if X should not survive that date, this formulation leads to no sensible result. In strict logic, if X disappears neither A nor B should succeed.[45] The result would be absurd, but in this context only statutory intervention could avoid such absurdity.

Such statutory intervention has indeed taken place in one part of this subject—in the law relating to *commorientes*. Before 1926 there was no presumption, if two people died in a common calamity, as to which of them died first. Now, section 184 of the Law of Property Act, 1925, provides that the deaths of such persons shall, for all purposes affecting the title to property, be presumed to have occurred in order of seniority. In making this provision the legislators of 1925 showed what at first sight appears to be a reckless disregard of logic. Why, it might be asked, did they not attempt to lay down rules which would approach more closely to the probabilities of the situation? They must have had before them codes which made elaborate provisions in the case of *commorientes* according to the age and sex of the persons who perished.[46] The rejection of these refinements by English law is, however, perfectly sound. The whole point of these cases of *commorientes* is that reasoning based on probabilities can yield no result because there

[42] *Chipchase* v. *Chipchase* [1939] P. 391 impliedly supports this view, though there are dicta in it to the contrary; *cf.* Wills, *op. cit.*, at p. 51, Phipson, *op. cit.*, at p. 701.

[43] *Hickman* v. *Upsall* (1875) L.R. 20 Eq. 136, 139.

[44] *Doe* d. *Knight* v. *Nepean* (1833) 5 B. & Ad. 86, affirmed (1837) 2 M. & W. 894, distinguishing *obiter dicta* in *Doe* d. *George* v. *Jesson* (1805) 6 East 80.

[45] *Cf. Wing* v. *Angrave* (1860) 8 H.L.C. 183; and *Re Aldersey* [1905] 2 Ch. 181 where Kekewich J. deliberately disregarded the requirements of strict logic. But his reasoning could have led with equal force to the opposite result.

[46] *e.g.*, the Californian Code of 1872, § 1963, set out in Wigmore on *Evidence*, 3rd ed., Vol. 9, at p. 355.

is *ex hypothesi* insufficient material for such reasoning to operate on. That being so, the best rule is that which is simplest and most convenient.[47] The English rule passes both these tests.

The question remains—just how far does section 184 go? It appears that the section is not limited to deaths occurring in a "common calamity." Thus

> "if a husband goes on a long voyage and the ship completely disappears in circumstances where his death has to be presumed to have occurred, but there is no material to indicate on what date he was drowned, and if his wife was in a nursing home when he started and subsequently died under an operation, there may be absolutely no means of ascertaining which of them died first."

Yet it has been said that in such a case section 184 would apply.[48] In this example, although there is no common calamity the two events causing the deaths do at least appear to be closely linked in time. The husband is on the ship at the same time as his wife is in hospital. But is it possible to go further and to say that section 184 would apply if the husband merely disappeared and the wife died in the nursing home a year after disappearance? If so, section 184 has swept away the whole law relating to proof of survivorship as set out above, and has replaced it by the principle of survivorship of the younger.

At first sight the argument appears attractive. In a case like *Re Phené's Trusts* two persons had died and it was "uncertain" which of them died first. The case would therefore appear to be within the very words of the section.[49] But to bring the section into operation, it must first be proved that two persons "have died." Where a person has merely disappeared, he is not proved to have died until seven years have elapsed. The presumption of death then establishes not only the fact, but also the time, of death. Provided that one guards against the error of supposing that, merely because a man is not presumed dead till the end of seven years he must be taken to be alive within that time, there is no harm in asserting that the presumption of death fixes the time of death at the end of the seven years. It is, therefore, not "uncertain" in a court of law when the person who disappeared died, for the presumption of death resolves the uncertainty. Section 184 would only apply, on this view, in a case where both the persons who "have died" disappeared on the same day.

(b) *Matrimonial Relations.* The problem as to the date on which a person dies becomes acute again where the person who

[47] So that, where considerations of justice demand an opposite rule, this can be adopted without violence to principle: see Intestates' Estates Act, 1952, s. 1 (4), discussed by Prof. J. D. B. Mitchell in 16 M.L.R. at pp. 208 to 209.

[48] *Hickman* v. *Peacey* [1945] A.C. 304, at pp. 314–5.

[49] See *Re Watkinson* [1952] V.L.R. 123, discussed in (1953) 26 Australian L.J. 570.

disappears is married. If the other spouse can satisfy the conditions required by section 16 of the Matrimonial Causes Act and obtain a decree of presumption of death and dissolution, no question as to time of death usually arises, and after such a decree subsequent legal relations present few difficulties. The date of the absent party's death is only material where issue is taken on the question of jurisdiction. Jurisdiction to hear such a petition is based primarily on domicile: section 16 (1); but in order to determine whether a petitioning wife is domiciled in England "her husband shall be treated as having died immediately after the last occasion on which she knew or had reason to believe him to be living": section 16 (4). This is the only purpose for which English law fixes the date of death at the beginning of the period of disappearance.

The more interesting cases are those in which such a decree could not, or had not, been obtained and the spouse that was left behind has remarried. Where W has been left by H1 and then marries H2, three problems can arise. First, H2 might set up the earlier marriage as a defence in matrimonial proceedings brought against him by W. Secondly, H2 might seek a decree of nullity on the ground of bigamy. Thirdly, W might be prosecuted for bigamously marrying H2 in the lifetime of H1.

The first problem has arisen most frequently in maintenance cases. In these the position appears to be as follows. The burden of proving that H1 was dead at the time of the second marriage lies initially on the wife who claims maintenance from her second husband. Thus if H1 disappears less than seven years before the second marriage, a claim based on the validity of this marriage will fail[50] unless there is evidence from which it can be inferred in fact that H1 was dead at the time of the second marriage.[51] This is in accord with the principle that the wife, who, in effect, bases a right on the death of H1 at the relevant date, must prove it. But where H1 disappeared more than seven years before the subsequent marriage the wife can discharge that burden by establishing the basic facts of the presumption of death.[52] These rules, it is submitted, would apply equally where H2 sets up the previous marriage in defence to any other form of matrimonial proceedings brought against him by W1, and to proceedings brought by any offspring of the second marriage claiming an interest in property on the footing that he was legitimate. But where H2 petitions for nullity he relies on the previous marriage as a weapon of attack. It is submitted that in this case it is he who has the burden of

[50] *R.* v. *Inhabitants of Harborne* (1835) 2 Ad. & E. 540; *Ivett* v. *Ivett* (1930) 140 L.T. 860. But see *Hogton* v. *Hogton* (1934) 103 L.J.P. 17, perhaps a case of "looking back"

[51] *R.* v. *Inhabitants of Twyning* (1819) 2 B. & Ald. 386 as explained in *Lapsley* v. *Grierson* (1848) 1 H.L.C. 498; *Deakin* v. *Deakin* (1869) 33 J.P. 805.

[52] *Chipchase* v. *Chipchase* [1939] P. 391.

proving that H1 was alive at the time of the second marriage. This burden must be discharged by evidence as there is no presumption of life in such cases. In *Chipchase* v. *Chipchase* H2, after the maintenance proceedings, petitioned for nullity [53] on the grounds of bigamy and undue publication of banns. The decree was granted on the second ground only but it seems that a petition based on the first ground alone would have failed.

Different considerations apply in criminal law. The present law may be summarised as follows: where A is charged with bigamously marrying B in the lifetime of his spouse C, the prosecution must prove affirmatively (i) that C was indeed married to A and (ii) that C was alive at the time of A's " marriage " to B. A can then defend himself by relying on the proviso to section 57 of the Offences against the Person Act. It will only be necessary for him to raise this defence if the prosecution in fact prove the life of C.

It has been suggested that serious injustice may be caused by the proviso in that it may afford a loophole through which the persistent bigamist can escape punishment.[54] With respect, the defect lies not in the relevant rules of law but in faulty prosecution tactics. This is best illustrated by considering a series of examples.

H marries W1 who disappears. Over seven years later he " marries " W2 and then W3. W1 is proved to be still alive.

The accused cannot be convicted of marrying W2 or W3 in the lifetime of W1 for the proviso will afford him a complete defence. Nor can he be convicted of marrying W3 in the lifetime of W2 for the marriage to W2 is void. But had the prosecution in respect of the second marriage been instituted promptly, the fact that W1 was alive would have been brought home to the accused and he could have been convicted in respect of the third marriage. In any case, the matrimonial career of the accused will be arrested after the first prosecution in which the life of W1 is proved. The case put does not open the door to schemes of perpetual bigamy.

H marries W1 who disappears. Less than seven years later he " marries " W2. Over seven years later he " marries " W3, W4 and W5. W1 is proved still to be alive. [*These were the facts of* R. v. Taylor.[55]]

Clearly, the reasoning given in the first example will preclude his being convicted of marrying W3, W4 and W5 in the lifetime of W1 or W2. But there is nothing to preclude his being convicted of marrying W2 in the lifetime of W1, unless indeed he can show that he had reasonable grounds to believe that at the time of the second marriage W1 was dead.[56] It so happened in *R.* v. *Taylor* that the accused had been prosecuted in 1945 for marrying W2

[53] [1942] P. 37.
[54] Prof. G. L. Williams, 13 M.L.R. 417.
[55] [1950] 2 K.B. 368.
[56] *R.* v. *Tolson* (1889) 23 Q.B.D. 168.

in the lifetime of W1 and that then the prosecutor was unable to prove that W1 was alive so that the prosecution failed. The unjust result in that case was therefore due merely to an error in tactics, not to any defect in the relevant rules of law.[57] Had the prosecution been conducted both promptly and diligently, no injustice would have arisen. If the prosecution were able to prove the life of W1 in 1949, it is not the fault of the law of bigamy that they were unable to do so in 1945.

The true defect in the law is not where W1 is still proved to be alive and the accused relies on the proviso, but where she disappears and cannot be traced at all. Further examples will make this clear :

H marries W1 who disappears. Less than seven years later he " marries " W2 and then W3. W1 still cannot be found.

H cannot be convicted of marrying W2 or W3 in the lifetime of W1 as the prosecution cannot prove the life of W1 at either relevant date : *R.* v. *Lumley*.[58] But as the prosecution cannot prove the death, any more than the life, of W1 at the time of the second marriage that marriage would have to be treated as void if H were indicted for marrying W3 in the lifetime of W2. In neither case does the accused have to rely on the proviso.

H marries W1 who disappears. More than seven years later he " marries " W2 and then W3. W1 still cannot be found.

On the reasoning given in the third example H cannot be convicted of marrying W2 or W3 in the lifetime of W1. Further, he cannot be convicted of marrying W3 in the lifetime of W2. There is no presumption in a bigamy case that W1 is dead seven years after her disappearance : thus for the purpose of the last indictment the marriage to W2 is void unless the jury find as a fact that W1 was dead at the relevant date.[59] Hence the accused is free to contract an infinite number of bigamous marriages provided that he does so within two points of time neither of which can be fixed with precision. On the one hand, he must not contract the first bigamous marriage so shortly after the disappearance of his real wife as to enable the jury to infer in fact that she was still living. On the other hand, he can be convicted of bigamy when the disappearance of W1 has receded so far into the past that the jury will feel justified in concluding, without the aid of presumption, that she was dead at the time of the ceremony last but one before the indictment. Even so, the task of drawing the appropriate indictment is far from easy. If the accused goes through a large number of ceremonies of marriage in quick succession, the jury may well

[57] The plea of *autrefois acquit* can frequently give rise to " substantial " injustice, but all civilised systems of law agree that this consideration is outweighed by the principle that *nemo debet bis vexari*.

[58] (1869) L.R. 1 C.C.R. 196.

[59] *R.* v. *Willshire* (1881) 6 Q.B.D. 366.

come to the conclusion that the first wife was already dead at the date of the third ceremony of marriage before the indictment, in which case the accused cannot be convicted of "marrying" his last "wife" in the lifetime of the last but one. And if he is then indicted for marrying the last "wife" in the lifetime of the last but two, there is no guarantee that the jury in this case will fix the date of W1's death at the same time as in the previous case. While it is no defect in the law that the prosecution should act with promptness and diligence, it is a defect to expect that the prosecution should be gifted with prophecy.

The defect could be partially remedied by applying the ordinary principles of the presumption of death to the law of bigamy—that is, by holding that a marriage more than seven years after the disappearance of the first spouse should for this purpose, as for maintenance purposes, be regarded as valid. The activities of the persistent bigamist would thus be restricted to something less than seven years. To stop such activities altogether it would be necessary to apply a presumption of life as well and to hold that the first wife should be presumed alive till the expiration of seven years from her disappearance. But this would cause general hardship to persons accused of isolated acts of bigamy, casting upon them the difficult task of affirmatively proving the death of the absent spouse as a matter of fact. It is submitted that such general hardship would outweigh the advantage of catching a few persistent bigamists.

(2) *Death without issue*

Where a person claims title to property on the footing that X died without issue the burden of proving such death lies on the claimant, and not on the person resisting the claim.[60] The question is whether the law recognises any presumption of death without issue by which the claimant can discharge that burden. The language of many of the judgments is emphatically against such a presumption, but it is open to question whether the effect of the judgments is consistent with the expressions contained in them.

In some cases no difficulty arises as there is sufficient evidence of death without issue. *Re Pople*[61] is a good example. The question was whether Mary Ann had died without issue. She disappeared four years ago and was now taken to be dead by virtue of the provisions of 6 Ann. c. 18. Her husband died nine months before the proceedings and by that husband she had had no issue. On these facts it was held that it was "exceedingly improbable"

[60] *Throgmorton* v. *Walton* (1624) 2 Rolle 461; *Richards* v. *Richards* 15 East 294 note a2. All the cases cited in the following discussion proceed impliedly on that basis; although in *Greaves* v. *Greenwood* (1877) 2 Ex.D. 289 Bramwell B. expressed some doubt on the point (at p. 291).

[61] (1889) 40 Ch.D. 589.

that she had any issue even if she were alive[62]; "but," said North J., "these proceedings are taken on the footing that she is dead, and if she is dead there is still stronger reason for concluding that there was no issue."[63] In such a case there is considerable justification for inferring death without issue as a matter of fact.[64] But the same cannot be said with any degree of assurance of other cases that purport to be based on a finding of fact that there was death without issue.[65]

The crucial case is *Greaves* v. *Greenwood*.[66] The plaintiff claimed property as heir of the paternal grandmother, and proved the death of all the descendants of the paternal grandfather. The defendant now showed, *inter alia*, that the paternal grandfather had a brother and an aunt alive some 120 years before the proceedings. The plaintiff succeeded even though he could not prove that these persons had died without issue. It was only necessary "to exhaust kinship of modern existence; but when one gets beyond living memory . . . I doubt whether he [the plaintiff] is bound to do more than say that he knows nothing about it."[67] In the Court of Appeal Cockburn C.J. said that there was no presumption of death without issue, but that there was some evidence, although inconclusive, on which a jury might act.[68] But it is submitted that evidence that the plaintiff "knows nothing about it" is so inconclusive as to have no persuasive value whatsoever. The great lapse of time, while increasing the probability of death, must surely decrease the probability of there being no issue. If the burden of proof that lay on the plaintiff was shifted, it is submitted that it could not have been shifted by the evidence. If it was not shifted by the evidence it could only have been shifted by a presumption of death without issue.

Such a presumption is recognised explicitly in some of the English cases.[69] But the operation of the presumption is still uncertain. It is clear from *Greaves* v. *Greenwood* that something more is required to raise the presumption of death without issue than the establishment of the basic facts of the presumption of death. This is only reasonable as the element of speculation involved in presuming death without issue is very much greater than that involved

[62] The logic of this is slightly impaired when it is remembered that a child conceived in the lifetime of the now deceased husband but born in a subsequent marriage would still have been "issue."

[63] At p. 593.

[64] *Cf. Re Jackson* [1907] 2 Ch. 354; *Jones* v. *Hughes* (1887) 4 T.L.R. 37.

[65] See *Rowe* v. *Hasland* (1762) 1 Wm.Bl. 404; *Doe* d. *Banning* v. *Griffin* (1812) 15 East 293.

[66] (1877) 2 Ex.D. 289.

[67] *Ibid.*, at p. 291.

[68] *Ibid.*, at pp. 295–6.

[69] *Doe d. Oldham* v. *Walley* (1828) 2 B. & C. 22. *Rawlins* v. *Miller* (1875) 1 Ch.D. 52; *Re Harding* (1891) *The Times* Newspaper, May 28, p. 3; *cf.* the sketchily reported Irish cases of *Re Thompson* and *Re Callan* (1905) 39 Ir.L.T.J. 372.

in merely presuming death. Exactly what that " something more " consists of it is difficult to say. It would seem that either there must be *some* evidence of death without issue, even though it be insufficient to lead of its own force to the desired conclusion; or that the circumstances must be so shrouded in uncertainty by the passage of time that it is practically impossible to obtain any evidence at all. It may be added that there is nothing more outrageous in presuming that a person died childless than in presuming that he died celibate; but the courts have frequently presumed death unmarried [70] without being in the least perturbed by the speculative nature of the presumed fact.

Safeguards

It may be that some of the views here expressed will be objected to on the ground that they tend to sacrifice logic too ruthlessly to convenience. But there are means of redressing the balance in favour of the party against whom the presumption operates. Where the action in which the presumption is applied is purely possessory, it will be possible to recover the property should evidence later become available that the fact was presumed against the truth,[71] provided that no third party has in the meantime acquired an overriding interest. Some statutes concerned with this question make express provision to the same effect.[72] On the same principle, a decree *nisi* of presumption of death and dissolution of marriage will be rescinded if before decree absolute the respondent is proved to be alive.[73] Where it is not possible to apply this principle of restitution, as in the case of a legacy of fungibles, the successful party may be ordered to give security in case a claim based on fresh evidence should later be made.[74] This principle, however, should be applied with caution lest it impair too greatly the practical utility of the presumption. Whether such security ought to be given, what its amount is to be, and how long it is to remain operative, seem to be matters for the discretion of the court, and it is submitted that that discretion ought only to be exercised if the party who suffers from the application of the presumption can make out some prima facie case, for example, if there is some evidence in rebuttal of the presumption but not sufficient actually to rebut it. Where there is no case for security,

70 *e.g.*, *Re Benjamin* [1902] 1 Ch. 723; *Dunn* v. *Snowden* (1862) 32 L.J.Ch. 104; *Re Westbrook's Trusts* (1873) W.N. 167.

71 *Doe* d. *Lloyd* v. *Deakin* (1821) 4 B. & Ald. 433; *Greaves* v. *Greenwood* (1877) 2 Ex.D. at p. 291.

72 19 Car. 2, c. 6, s. 5; 6 Ann. c. 18, s. 3, providing further that interim rents are recoverable. Perhaps the enigmatic words " subject to any order of the court " in Law of Property Act, 1925, s. 184, have the same effect: see *Re Grosvenor* [1944] Ch. 138, 143.

73 *Manser* v. *Manser* [1940] P. 224.

74 *Bailey* v. *Hammond* (1802) 7 Ves.Jun. 590; *Dixon* v. *Dixon* (1792) 3 Bro. C.C. 510; *Dowley* v. *Winfield* (1844) 14 Sim. 277.

it is still possible to frame the judgment in such a fashion as to leave open future claims based on fresh evidence[75]: if this course is adopted, the only possible injustice would be in the case of the insolvency of the originally successful party. The existence of all these safeguards seems to provide an answer to criticisms of the presumption on the ground of arbitrariness, and to ensure that an adequate balance is maintained between the demands of logic and those of convenience.[76]

G. H. Treitel.*

[75] *Re Benjamin* [1902] 1 Ch. 723.

[76] I should like to thank Mr. Rupert Cross, Fellow of Magdalen College, Oxford, who kindly read this article in manuscript and made many valuable suggestions for its improvement.

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RECENT DEVELOPMENTS IN THE HOSPITAL CASES

THE developments here discussed are primarily those that have taken place since *Cassidy* v. *Ministry of Health* [1951] 2 Q.B. 343.[1] The hospital cases have been made the subject of a detailed survey because they have attained a special significance in employment law and the law of tort. The entire relationship in law between master and servant and between professional men and women and their employers and the public is involved in them and has been illuminated through them. In particular, in the legal history of the adaptation by the courts of the master and servant relationship to modern conditions of employment, they are likely to be regarded as having occupied a position of critical importance.

But, to give proper weight to the various aspects of these decisions, four matters deserve to be commented upon separately.

1. *The Standard of Professional Skill and Care*

Some apprehension has been murmured in medical circles that the standard of professional skill and care required by the courts may be set unrealistically high. The judgments, including especially the most recent, show this concern to be unfounded. Reasonable skill and care are properly demanded by the courts of those engaged in medicine, as of the members of other skilled professions; and the criterion is applied with a clear regard to the interest of the medical profession itself and of the public in the protection of doctors and "medical auxiliaries" who have observed the standards of their calling, and in the continued advancement of medical science.

The clearest expression of judicial policy in this respect is found in the judgment of Denning L.J. in *Roe* v. *M. O. H.* [1954] 2 W.L.R. 915. "Medical science has conferred great benefits on mankind but these benefits are attended by considerable risks. Every surgical operation is attended by risks. We cannot take the benefits without taking the risks. Every advance in technique is also attended by risks. Doctors, like the rest of us, have to learn by experience; and experience often teaches in a hard way" (923). And, "we should be doing a disservice to the community at large if we were to impose liability on hospitals and doctors for everything that happens to go wrong. Doctors would be led to think more of their own safety than of the good of their patients. Initiative would be stifled and confidence shaken. A proper sense of proportion requires us to have regard to the conditions in which hospitals and doctors have to work. We must insist on due care

[1] For an important and influential analysis of *Cassidy's* case, see Prof. Kahn-Freund's note in 14 M.L.R. (1951) 504.

for the patient at every point, but we must not condemn as negligence that which is only a misadventure" (926).

This policy was firmly and fairly pursued in all recent hospital and doctor decisions. The great difficulty facing a general practitioner in diagnosing acute rheumatoid arthritis in the absence of joint swellings was recognised by Devlin J. in *Pudney* v. *Union Castle Mail S.S., Ltd.* [1953] 1 Lloyd's Rep. 73. Again, though it was unknown in 1947 to the English medical profession as a whole, in forestalling the risk of infection resulting from lumbar injections with nupercaine by keeping the ampoules of nupercaine in phenol before use, a far greater risk was run of percolation of the phenol into the ampoules through invisible flaws in the glass. This risk materialised in the case of the two plaintiffs in *Roe* v. *M. O. H.* (*supra*) who, having received lumbar injections preparatory to minor operations, were paralysed for life. Two U.S.A. publications in 1946 had drawn attention to this danger but "neither," the courts thought, "would be within the range of the ordinary anaesthetist in this country" (*per* McNair J., in the court below, [1954] 1 W.L.R. 135). The Court of Appeal approved this application by McNair J. of "the standard of the reasonably competent anaesthetist" and the defendants were exonerated from liability ([1954] 1 W.L.R. 135; [1954] 2 W.L.R. 918–20, 923–4, 931).

On the other hand, there was not a proper observance of reasonable standards of skill and care in *Jones* v. *Manchester Corporation* [1952] 2 Q.B. 852. A house surgeon injected pentothal into a patient who was still under the influence of nitrous oxide previously administered to him; a method of proceeding which was generally known to be very dangerous and which, in the instant case, proved fatal. The doctor and hospital were held liable.

In holding the balance between the interests of patients and of medical practitioners and hospitals, the doctrine of *res ipsa loquitur* plays a vitally important role. If a hospital patient suffers in a way that is not a normal or reasonable incident or risk of the treatment he received, this calls for an explanation from the hospital of how the accident might reasonably have occurred without lack of due care on the part of its staff (see Denning L.J., *Cassidy* v. *M. O. H.*, *supra*, 365–6; *Roe* v. *M. O. H.*, *supra*, 922). Where the treatment was under the control of two or more medical practitioners or auxiliaries, the evidentiary doctrine may not, of course, speak of negligence against anyone individually, but this will be immaterial provided the hospital is legally responsible for the acts of all concerned (*e.g.*, Morris L.J., in *Roe* v. *M. O. H.*, *supra*, 930). It is in this connection that the issue of whether hospitals are liable for the torts of their consultants is of real, practical significance to a plaintiff.[2]

[2] The usual reason, from the point of view of the plaintiff, for applying *respondeat superior* is not so pressing in such cases, for the medical specialist, being the best-paid branch of a well-paid profession, is able without undue

2. *Classes of Personnel for Whom Hospitals are Liable*

The range of personnel for whom hospitals are in law responsible no longer stands where *Cassidy's* case left it. In *Roe's* case, *supra*, it was held by the Court of Appeal that, had negligence been found, the hospital would have been liable for the acts of its part-time specialist in anaesthetics who was remunerated by participating in a special fund derived from investments, contributions and donations for division among the whole of the medical and surgical staff, including visiting and consulting surgeons, and who was at all times allowed to continue his private anaesthetic practice. This decision was all the more striking in that it dissociated itself from the view expressed by McNair J. in the court of first instance, that "the position of Dr. Graham as a specialist anaesthetist was comparable to that of a visiting surgeon or physician for whose acts the hospital does not assume responsibility in law" ([1954] 1 W.L.R. 132–3). Needless to say, the Court of Appeal also disagreed with the learned judge below in saying point blank that hospitals have no legal responsibility for their visiting surgeons and physicians. Two of its members left the point open (*supra*, 920, 929). Denning L.J. considered it already covered by his previous judgment in *Cassidy's* case (922).

For the time being, then, visiting surgeons and physicians remain an enigma. But the thin end of the wedge has been inserted; for, with the possible exception of those honorary consultants who still attend at the voluntary hospitals that were omitted from the operation of the National Health Service Act, 1946,[3] no rational distinction can surely be urged between the independent nature of the work and the terms of employment of Dr. Graham in *Roe's* case, and that of the specialist surgeons and physicians who serve in N.H.S. hospitals today on a part-time basis at a sessional fee.[4]

But, apart from the argument by way of simple analogy, the liability or non-liability of hospitals for the torts of those they employ must ultimately rest in law on the way in which the courts define the nature of the liability of hospitals in such cases.

3. *Legal Nature of the Liability of Hospitals*

Three separate doctrines have been enunciated:

(i) The oldest, of course, bases the liability of hospitals on the

financial embarrassment to insure himself against his common law liability, even if he may find the payment of heavy damages out of his own pocket a grave burden.

[3] See Morris L.J., in *Roe's* case, *supra*, at 929, Somervell L.J., *Roe's* case, at 920, and Pilcher J., in *Higgins* v. *N. W. Metropolitan Hospital Board* [1954] 1 W.L.R. at 423.

[4] Like the consultant surgeon in *Collins* v. *Herts C. C.* [1947] 1 K.B. 598, 619, for whom Hilbery J. found the hospital not responsible in law at that time (noted in 10 M.L.R. (1947) 425).

general principle of *respondeat superior*, *i.e.*, on the vicarious [5] liability of an employer for torts committed by his servants in the course of their employment. In case after case, the courts have had to determine whether a particular member of the hospital staff is, in law, a servant of the hospital. This, in turn, has involved, as it were, a clinical study of the " control " criterion of service which has sharply re-emphasised the bankruptcy of that test in contemporary conditions of employment and precipitated interesting and important attempts to re-establish the legal relationship of master and servant upon an acceptable modern footing.

In the evolution of the theoretical basis of the master and servant relationship at common law, *Cassidy's* case may now be seen to be emerging as a decisive turning-point and a point of new departure. Not only did the Court of Appeal in that case face up candidly to the fact that the power of, say, a Regional Hospital Board to control how its doctors worked was a worn-out fiction, but there appeared in their judgments the suggestive beginnings of an " organisation " test of service at common law. Since then, the judicial tendency, in both hospital and other cases, to show dissatisfaction with the unreality of the control test and to substitute for it what amounts to an organisation test, has grown impressively.[6]

The new form of test has so far been formulated most completely by Denning L.J. in *Stevenson* v. *Macdonald* [1952] 1 T.L.R. 101, in these words: " One feature which seems to run through the instances is that, under a contract of service, a man is employed as part of the business and his work is done as an integral part of the business; . . . under a contract of services, his work, although done for the business, is not integrated into it, but

[5] The vicariousness of the liability is becoming problematical: see *Broom* v. *Morgan* [1952] 2 T.L.R. 904, 906 (Goddard L.C.J.), [1953] 1 Q.B. 597, 607–8 (Denning L.J.), noted in 16 M.L.R. (1953) 376; Glanville Williams, *Joint Torts and Contributory Negligence*, § 115; but see Prof. Newark on *Twine* v. *Bean's Express, Ltd.*, 17 M.L.R. (1954) 102. Also, Hughes & Hudson, 31 Can.Bar Rev. (1953) 18.

[6] Even the organisation test of service is not capable of mechanical application or of readily solving all the problems that arise. Thus, the general-temporary employer situation typified in *Mersey Docks and Harbour Board* v. *Coggins and Griffiths* [1947] A.C. 1, would have to be re-thought out. In particular, some Crown servant cases are even less amenable to the organisation than to the control test, like whether a public corporation is a servant of the Crown or the kind of problem posed in *Bank voor Handel* v. *Slatford* [1954] 2 W.L.R. 867, issues which ought probably to be solved within their own peculiar frame of reference and not by trying to stretch over them the common law conception of " servant " because of the historical usage of the word in Crown relationships. The definition of " employed person " under the National Insurance Act, 1946, s. 1 (2), is another case in point; as is also the determination of whether an employee is a " servant " for the purpose of imposing on his employer responsibility for the employee's safety at work: *Cf.* Parker J. in *Garrard* v. *Southey* [1952] 2 Q.B. 174, 179. Perhaps the most satisfactory road to future legal development in this context would be by way of differentiating and formulating separate rules for the various distinct types of employment situations with which the law is concerned.

is only accessory to it" (at 111). The organisation or "subordination" [7] kind of test has also been adverted to by Streatfeild J. in *Bauman* v. *Hulton Press* [1952] 2 All E.R. 1121, 1124, Devlin J. in *Bank voor Handel* v. *Slatford* [1952] 1 All E.R. 314, 318–9, 320 and 322, and especially Denning L.J. again, in the same case on appeal in [1953] 1 Q.B., at 295. Furthermore, in *Roe's* case, Somervell L.J. (as he then was), while pointing out that the part-time specialist anaesthetist there was a qualified, skilled man, controlling as such his own methods of work, would have attached vicarious liability to the hospital for his acts because he was "part of the permanent staff and therefore in the same position as the orthopaedic surgeon in *Cassidy*" (at 920. *Cf.* too Morris L.J., at 930).

Pilcher J. in *Higgins* v. *N. W. Metropolitan Hospital Board* [1954] 1 W.L.R. 411, was, if anything, even more explicit than Lord Somervell, regarding the fact that a doctor's work in a hospital lies beyond the effective control of his employers, when he spoke of "the development of the law along the line that a doctor's uncontrollability in the exercise of his professional functions does not take him out of the servant category to which the principle of *respondeat superior* applies" (at 422).

The desirability of adopting an organisation test in preference to the control test of service has already been forcefully argued by Prof. Kahn-Freund in his learned note on *Cassidy* three years ago.[8] One possible technical obstacle to the absorption of the new test into the *corpus* of the common law by the courts without the need for reforming legislation may be very briefly mentioned here. It is raised by the question –not simple to answer– to what extent has the control test become established as a principle of law in the courts?

The idea of control as the hallmark of "servanthood" is deep-seated in English law.[9] The more refined, modern form of the control test was clearly stated by Bramwell L.J. in *Yewens* v. *Noakes* (1880) 6 Q.B.D. 530, 532–3, and subsequently repeated with approval in the Court of Appeal.[10] But, authority has not been wanting for the proposition that control or the power of control, far from being a governing legal criterion, is no more than a very important factor in determining whether a contract of master and servant exists.[11] As recently as 1946, the House of Lords,

[7] *i.e.*, subordination to the employer's power to organise (14 M.L.R., 508).

[8] See note 1, *supra*. *Cf.* also the provocative talk of Prof. C. J. Hamson in *Law in Action*, 1953, 17.

[9] *e.g.*, Blackstone, *Commentaries*, 5th ed., I, 431; *Lane* v. *Cotton* (1707) 12 Mod. 472, 458–9.

[10] See *Honeywill* v. *Larkin Bros.* [1934] 1 K.B. 191, 196; *Hewitt* v. *Bonvin* [1940] 1 K.B. 188, 191.

[11] See *Simmons* v. *Heath Laundry Co.* (1910) 3 B.W.C.C., 205; *Underwood* v. *Perry* (1922) 15 B.W.C.C., 133; *Smith* v. *General Motor Cab Co.* [1911] A.C. 188, 191, 193; *Gold* v. *Essex C. C.* [1942] 2 K.B. 293, 313.

in *Short* v. *Henderson*, 62 T.L.R. 427, regarded the factor of control only as "the principal requirement of a contract of service," though "this factor of superintendence and control has frequently been treated as critical and decisive of the legal quality of the relationship" (at 429). And their Lordships added: "Modern industrial conditions have so much affected the freedom of the master in cases in which no one could reasonably suggest that the employee was thereby converted into an independent contractor that, if and when an appropriate occasion arises, it will be incumbent on this House to reconsider and to restate these *indicia*" (*ibid.*).

On the other hand, from a careful reading of *Mersey Docks and Harbour Board* v. *Coggins and Griffiths* [1947] A.C. 1, it is hard to avoid drawing the conclusion that the House viewed the question of control or power to control as the legal test to fix the nature of a contract of employment; though the meaning given to "control" was substantially narrower than and so out of line with that found in other cases.

If the control test is only one *indicium* of a contract of service, albeit regarded in the past as *primum inter paria*, the technical impediment to replacing it in all or almost all cases with the organisation test disappears. But, if that test has the rank of a legal principle in the House of Lords, then, to retain the advantage of the organisation test, it would be necessary to argue the organisation "factor" as the "vital element" in determining whether "control" in any employment situation exists: the artificiality of this method of reconciliation need not be emphasised.

But only the House of Lords can resolve the puzzle which, I believe, is a real one. When the case of, say, a visiting hospital surgeon comes before the House for determination, it will, it is hoped, be the occasion for the establishment of one of the most important relationships governed by common law on firm, modern foundations, in a manner comparable to the modern statement of the tort of negligence in *Donoghue* v. *Stevenson* [1932] A.C. 562.

(ii) The second and the third of the theoretical bases for the liability of hospitals remove the discussion from the plane of general principle to the level on which a special situation is met by postulating for it a special rule.

The one rule was that advanced by Denning L.J. in *Cassidy's* case.[12] Hospitals are under a "personal" duty to use reasonable care in treating their patients; the performance of this duty must be delegated to employees, whether "servants" or "independent contractors"; but the responsibility for its due performance may not be. The rule is clearly similar to that of the employer's duty

[12] Reiterated by the learned Lord Justice in *Jones* v. *Manchester Corpn.*, *supra*, 867, 869 and in *Roe's* case, *supra*, 922, and described in *Higgins's* case by Pilcher J. as "interesting" (*supra*, 418).

of care for the safety of his servants, developed under pressure of the doctrine of common employment.

Given this duty, it is immaterial whether or not the patient is a paying patient, whether or not the hospital is a voluntary hospital and whether or not the medical employee is full-time or part-time, servant or independent contractor. Under Denning L.J.'s rule, the responsibility of the hospital in law for the acts of its staff is, thus, wider than under the organisation or control tests.

A hypothetical, borderline case may be posed : a specialist ear, nose and throat hospital admits a patient for sinus treatment. On the following day, the patient complains of acute gastric pain. The E.N.T. specialists, finding themselves in a strange line of country, call in a specialist in gastric troubles (whether from Harley Street or the nearest hospital) who diagnoses a perforated stomach ulcer and declares it necessary to operate within the hour. The necessary operating equipment is improvised and the outside specialist performs the operation. Under Denning L.J.'s rule, the hospital would probably incur legal responsibility for the outside specialist : in an emergency a hospital may be expected to react with reasonable care and intelligence to succour its patient; an outside specialist needed to meet the emergency should therefore be the responsibility of the hospital. There would be no such responsibility, it may be noted, if either the organisation or control tests were applied.

(iii) The third, theoretical base involves a rule similar to but not identical with that of Denning L.J. It originated in the judgment of Lord Greene M.R. in *Gold* v. *Essex C. C.*,[13] and has been further explained by Morris L.J. in *Roe's* case. In gist, it is that a hospital is liable for the acts of those it employs to fulfil the "obligation" it assumes towards the patient. This obligation is not apparently a contractual one, but a general kind of obligation, which differs from the duty proposed by Denning L.J., in that, whereas under the latter the hospital's obligation is defined in detail as a matter of law, the obligation test leaves the content of the hospital's obligation to be inferred as "a question of fact . . . having regard to the particular circumstances of each particular case" (*per* Morris L.J. *Roe*, *supra*, at 928–9). In each case, the extent of the obligation is deduced as "the natural and reasonable inference to be drawn from the way in which those running the hospital conducted their affairs" (Morris L.J., *ibid.*, at 929).

Whether, ultimately, the scope of a hospital's "obligation" will be seen to differ from the scope of its "duty" as laid down by Denning L.J. is impossible to predict. The only certain comment that can be made on the obligation test is that it embodies

[13] Approved and adopted by Hilbery J. in *Collins's* case, *supra*, 616, and Singleton L.J. in *Cassidy's* case, *supra*, 357–8.

a more cautious approach than that evidenced in the Denning rule to the determination of a hospital's responsibility for its staff in accordance with a doctrine specially devised for the purpose. Certainly, too, it leaves the law more uncertain than under the Denning rule.

One common result of all three tests of liability is that a hospital is not liable for the acts of doctors and others who may be employed by the hospital patient himself.

4. *Apportionment of Damages between Hospital and Tortfeasor*

In recent years, it was the official policy of the Ministry of Health, where damages were awarded against a hospital authority, that the authority should seek to obtain from its offending employee a contribution or indemnity under the Law Reform (Married Women and Tortfeasors) Act, 1935.[14] So, in *Jones* v. *Manchester Corpn.* (*supra*), the hospital claimed an indemnity against its house surgeon and was awarded, in fact, one-fifth of the damages it had to pay.

But, since March, 1954, the above policy applies only to those members of hospital medical staffs who do not insure themselves against common-law liability with the Medical Defence Union or Medical Protection Society of England and Wales or the Medical and Dental Defence Union of Scotland. Those who are so insured and are defended by the relevant Defence Union and Protection Society come within the terms of Circular H.M. (54) 32, whereby the hospital joins in defending the case and, in the event of damages being awarded, bears such proportionate share of them as the hospital and protection society agree upon, or, in default of agreement, at least an equal share.

Two effects of the new Circular may be noted. First, as the hospital and protection society are directed to present a united front to the plaintiff, the importance of the doctrine of *res ipsa loquitur* is likely to be enhanced.[15] And, second, the Circular affords an obvious incentive to medical staff to insure against common-law liability, thus encouraging the fullest development in this field of the fruitful partnership of the law of tort, for maintaining acceptable standards of conduct, and the law of insurance, for collectivising the financial risks run by medical practitioners in their calling.

A final legal point arising out of *Jones's* case merits attention. It occurs in the dissenting judgment of Hodson L.J., and, although its relevance to hospital cases may have been weakened by the

[14] See RHB(49) 128/HMC(49) 108/BG(49) 113. (These are departmental circulars of the Ministry of Health.)

[15] Under the older policy, the hospital refrained from assisting the doctor in his defence; on the contrary, there was strong reason to adduce all the evidence against him for the action for contribution/indemnity. For a considered review of the Circular, see the editorial by Mr. S. R. Speller, in *The Hospital* of May, 1954.

new Circular, its potential significance in the general law of employment is undoubted.

It is established law that a servant impliedly contracts that he possesses skill "reasonably competent to the task he undertakes" and will show reasonable care in the exercise of that skill. If a lorry driver negligently runs down a pedestrian, or a hospital doctor injures a patient through careless diagnosis, each violates the term implied in their contracts of employment. Equally, a bus conductor who ejects a passenger by punching him on the nose will be in breach of his contract of employment, but, this time, through his misconduct or disobedience to orders. The damages paid by the employer to the third party in such cases will be the reasonably foreseeable loss incurred by him as a result of his servant's breach of his contract of employment.

Therefore, observed Hodson L.J., approving a dictum of Warrington L.J. in *Weld-Blundell* v. *Stevens* [1919] 1 K.B. 520, 536, the employer may recover the damages he had to pay the injured party in an action against the servant for breach of contract. One may add that the employer may also, on the same ground, dismiss the servant summarily. It was on this ground that Hodson L.J. wished, in *Jones's* case, to award the hospital against its doctor all the damages it was directed to pay the deceased patient's estate (*supra*, at 876, 877). It was further in the light of this line of reasoning that the learned Lord Justice considered that there was, in the case, no room for the operation of the L. R. (Married Women and Tortfeasors) Act, 1935 (*ibid.*, at 876–7). According to the learned Lord Justice, the discretion conferred on the courts by that Act is displaced: there is no room for such discretion in the action for breach of the contract of employment, and, in all such employment cases, the employer becomes entitled to what is, in effect, a full indemnity.

More recently, in *Semtex, Ltd.* v. *Gladstone* [1954] 1 W.L.R. 945, Finnemore J. approved and adopted Hodson L.J.'s minority ruling (at 949). The learned judge went on to draw the strictly logical conclusion that the meagre means of the servant are immaterial (at 950). From a practical viewpoint they are most material, and, from a legal viewpoint, they ought, it is respectfully submitted, to be material. Employers' vicarious liability today rests surely on the social principle that, in the overcrowded, mechanised and complex life of a commercial and industrial society, the employer should bear the occasional losses that result from injury suffered by a member of the public whose path has been crossed by the servant pursuing his employer's business, or making use of the facilities of his employer's business. It is the employer who puts the servant in the position to inflict the injury, it is the employer who otherwise derives profit from the activities of his servant, and, in any case, it is the employer who is far better able to bear such occasional losses by assimilating them into the

overheads of his business or into the overheads of commerce generally through insurance.[16]

But, the technical argument that Hodson L.J. has raised is formidable [17]; and it will require the utmost judicial skill to prevent the policy of the 1935 Act in employment cases and the general considerations of practical justice as between employer and employee from being overturned by a purely logical projection of a rule originally tuned to a different problem.[18]

C. Grunfeld.*

[16] See Denning L.J. in *Broom* v. *Morgan*, *supra*; Glanville Williams, *op. cit.*, § 115.

[17] Denning L.J. in *Jones's* case goes part of the way towards meeting Hodson L.J.'s argument on the technical level. There is, the learned Lord Justice pointed out, no term implied in a contract of employment that a servant will indemnify his employer for damages the latter has been ordered to pay a third party in respect of the servant's tort (at 868–9). Hodson L.J. did not gainsay this but reasoned that the employer might obtain indirectly that to which he had no direct right. But, if, in these third party cases, the employer is not to be regarded as an innocent party in law (*Jones*, *supra*, at 870), and is fixed, in law, with personal and not vicarious liability (see note 5, *supra*), then it is possible to argue that the employer's loss is *primarily* the result of a breach of a duty the responsibility for the performance of which the law imposes on the employer personally, *i.e.*, that his loss is, in law, his own personal responsibility, although it was in fact caused not by his own acts but by his vicarious acts through his servant.

[18] The implications of Hodson L.J.'s line of reasoning go even deeper. They were referred to for the first time in his note in this Review on *Stapley* v. *Gypsum Mines* by Prof. Glanville Williams (17 M.L.R. (1954) 66, 71). If the argument were adopted, the bias of workmen's cases would tend to be tilted against workmen plaintiffs again; large numbers, for example, of woodworking regulations decisions, where the workman was injured through disobeying the order originally given him to maintain the guard of his machine properly adjusted at all times, would have to be reconsidered. Injured workmen do, it is true, receive industrial injury or disablement benefit, but it must be borne in mind that this benefit is a subsistence benefit, not, like common law damages, compensation for the injury suffered. The policy of general, industrial legislation as well as of the Contributory Negligence Act, referred to by Prof. Williams, should, it is respectfully submitted, be carefully weighed, before giving full effect to the logical consequences of the technicality which has been raised.

Furthermore, on the technical level, the following argument may be advanced. The main duties owed by an employer at common law for the safety of his servants and all duties imposed by statute on employers for the safety, health and welfare of his servants are, in law, personal to the employer. There is no implied term that the servant will indemnify the employer where the servant's injury results in fact from his own acts in breach of his contract (see note 17, *supra*). So far as the duty is statutory, the employer and servant may not contract out of it expressly or impliedly (*e.g.*, *Groves* v. *Wimborne* [1898] 2 Q.B. 402). The duties, whether statutory or common law, are personal, and the legal responsibility for their fulfilment is personal though the acts through which they are performed or violated are usually vicarious. Hence, the damages an employer is ordered to pay a workman for injuries suffered because of a breach of such duty are *primarily* the result in law of the employer's personal breach of duty, though committed through vicarious acts of the servant which amount technically to a breach of the latter's contract.

If the workman is injured through an act of a fellow workman amounting to a breach of the latter's contract of employment, the employer's attempt to obtain an indirect indemnity against the latter might be met along the lines indicated in note 17, *supra*.

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STATUTES

Law Reform (Limitation of Actions, etc.) Act, 1954 [1]

The implications of increased State intervention in the commercial, industrial and private affairs of citizens have engendered, within the legal system, a movement towards razing the legal privileges enjoyed in the past by the Crown and other public authorities when being sued or prosecuted by private persons for alleged wrongs. The Crown Proceedings Act, 1947, is the most important reflection of the modern attitude. The new Act has the more modest aim of implementing this policy within the law of limitation of actions. This is one main purpose of its provisions.

The other is to adjust certain general limitation periods to limits which experience suggests are fairer or more convenient than those now replaced. These will be submitted to a brief analysis first.

I. Amendment of Scheme of Limitation Periods in the 1939 Act

The leading amendment is that, "in the case of actions for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provisions made by or under a statute or independently of any contract or any such provision) where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to any person," the limitation period shall be three years instead of six (section 2 (1)). "'Personal injuries' includes any disease and any impairment of a person's physical or mental condition" (section 2 (3)).

The amendment is confined to civil actions brought for common law damages. It does not extend to criminal prosecutions or to proceedings for equitable relief, though, in deciding on whether such relief is barred by lapse of time, the courts will doubtless adopt the new limitation period in appropriate cases "as a rule to assist their discretion" (Alderson B., *Brooksbank* v. *Smith* (1838) 2 Y. & C. 58, 60).

The period of three years will apparently apply in future to two main types of action: (i) Actions in tort for damages for personal injuries whether caused by negligence, nuisance, breach of statutory duty or any other breach of duty in tort,[1a] like assault and battery, the duty of the occupier of "dangerous premises," the duty under

[1] Based on the Report of the Committee on The Limitation of Actions (1949). Cmd. 7740.

[1a] The words, "or breach of duty" in the leading amendment must surely refer to tort actions in general. It is certainly not a phrase of art in the law of tort, and it is improbable that it is being used in the Act with Hohfeldian overtones.

the rule in *Rylands* v. *Fletcher* (1866) L.R. 1 Ex. 265, or liability for injuries caused by animals or by false words and threats as in *Janvier* v. *Sweeney* [1919] 2 K.B. 316. For all other kinds of tort actions, and, indeed, in any tort action in which damages are not claimed for personal injuries, the old limitation period of six years continues to apply. (ii) Actions for damages in respect of personal injuries suffered as a result of breach of contract. The most important examples of this kind of liability would seem to arise out of the contract of carriage of passengers, by road and rail,[2] the contract of employment of an independent contractor, like a personal surgeon or physician, the contract of hire-bailment, as in *Chapleton* v. *Barry U. D. C.* [1940] 1 K.B. 532, or *White* v. *Warwick* [1953] 1 W.L.R. 1285, the contract for the sale of goods, as in *Chapronière* v. *Mason* (1905) 21 T.L.R. 633, or *Priest* v. *Last* [1903] 2 K.B. 148, and the *Francis* v. *Cockrell*[3] warranty implied in the contract of licence to enter premises. In other actions for breach of simple contract, the limitation period remains at six years.

It should be emphasised that plaintiffs are bound by the shorter period not only where they claim damages for personal injuries alone, but also where they ask for mixed damages for, say, property loss as well as personal injuries. If a plaintiff with a claim for mixed damages has delayed commencement of his action beyond three years, he will apparently not be barred provided he is prepared to sacrifice the claim in respect of personal injuries.

Moreover, the wording of the amendment makes it clear that the personal injuries in question may have been suffered by some person other than the plaintiff. It may, therefore, include the case where the retailer of a bun, which has injured a customer, claims from the manufacturer damages (*inter alia*) to cover the damages the retailer himself had to pay the customer.

Finally, it should be said that the definition of "personal injuries" does not make it as certain as one would have wished that it covers all the harmful effects of an accident, in particular of nervous shock, like inability to concentrate, which is embarrassing at any time and can be very serious in certain occupations, including the running of a home.

A consequential reduction to three years has been made of the limitation period affecting a person under disability to whom a cause of action for personal injuries has accrued (section 2 (2)). A new requirement, however, of disproof of infancy has been introduced in the case of all issues of limitation of action involving disability (section 2 (2)).

II. Amendment of the Fatal Accidents Act, 1846

The twelve-months limitation period to which "dependants" were made subject under the 1846 Act has been extended to three

[2] As to sea and air, see *infra*.
[3] (1870) L.R. 5 Q.B. 184, 501.

years [4] (section 3). It is possible to regard this as a special case of an action for damages "in respect of personal injuries to any person."

III. Amendment of the L. R. (Miscellaneous Provisions) Act, 1934

Where a cause of action in tort was maintainable against a person since deceased, it is no longer necessary for the plaintiff to show that the cause of action arose no earlier than six months before the death (section 4). But it remains necessary that proceedings should be taken not later than six months after representation has been taken out by the deceased man's personal representative, and, in any event, within the appropriate period laid down in the Limitation Act, 1939, as amended by the 1954 Act.

IV. Abolition of Privileges of the Crown and Other Public Authorities

The advantage of the general limitation period of twelve months given to "public authorities" by the Public Authorities Protection Act, 1893, and the Limitation Act, 1939, s. 21, and reserved for the Crown by the Crown Proceedings Act, 1947, ss. 30 (2) and 48, has been erased, whether in civil actions, criminal prosecutions or proceedings for equitable relief (section 1 (*a*) (*b*)), with one exception, namely, proceedings against the Crown, under the Crown Proceedings Act, 1947, s. 9 (2), for loss of or damage to registered inland postal packets (section 5 (3)). In addition, every kind of "public authority," including the Crown, has been deprived of the special statutory defence of tender of amends in actions in tort and contract for unliquidated damages (section 1 (*a*) (*b*)).

Also, the 1954 Act has abolished the twelve-months period and the defence of tender of amends conferred on the Air Force and Army by the Air Force Act and the Army Act (as amended by the Visiting Forces Act, 1952, s. 13 (5) [5]) (section 1 (*d*)).

Also abolished are the special limitation periods of three years in respect of contract and tort actions generally, and certain others, that have been enjoyed since the war by the National Coal Board, the British Transport Commission, the Area Electricity Boards, the Gas Council and its Area Boards and the New Town Corporations (section 1 (*c*)). As to the Air Corporations, the three-years

[4] In 1936, the Law Revision Committee said of the twelve-months period: "We consider that this period is a reasonable one for the class of case to which it applies, and that the risk of any claim failing for want of due prosecution is negligible" (Cmd. 5334, at p. 38).

[5] This subsection contains an eminently quotable piece of "statutese": "Section one hundred and seventy of the Army Act . . . shall have effect as if references in that section to that Act included references to any provisions of that Act as applied by the foregoing provisions of this Part of this Act."

period introduced only at the end of last year by the Air Corporations Act, 1953, s. 3,[6] has, similarly, been repealed.

Now, the Crown and other public authorities, including the public corporations, have been levelled down to the condition of other litigants and come under the provisions of the Limitation Act, 1939, as amended by the Act of 1954.[7]

The effect of the amendments in the 1954 Act on two of the special periods of limitation saved under section 32 of the 1939 Act may be noted. The one is the two-years period laid down in the Maritime Conventions Act, 1911, s. 8, in respect of actions against shipowners for loss sustained by other vessels or by passengers on other vessels, which is now extended to ships in the service of the Post Office and of the armed forces of the Crown (section 5 (2)).[8] The other is the two-years limitation period applied to actions against air carriers, private and public, for damages falling within the provisions of the First Schedule of the Carriage by Air Act, 1932, (the " Warsaw Convention "), and the 1952 [9] and 1953 [10] Orders applying an amended Convention to non-international carriage and carriage in the Colonies, Protectorates and Trust Territories. This special period too is saved by the Limitation Act, 1939, s. 32, and, within the frame of its operation, displaces the provisions of both the principal, 1939, Act and its 1954 amendment. On the other hand, other types of action falling outside the terms of the Convention both by and against air carriers are now subject to the Limitation Acts, 1939–54.

C. Grunfeld.

Atomic Energy Authority Act, 1954

(2 & 3 Eliz. 2, c. 32)

Acts establishing public corporations are always interesting in their draftsmanship as in their contents. This Act draws on earlier precedents. The Authority is of the size (eight to eleven members) usual for nationalised industries; the members are wholly appointed by a Minister, though the choice of the Lord President of the Council derives from his previous association with the subject and he is, in contrast to nationalisation precedents, not the head of a Department concerned with similar and connected matters. The

[6] Designed to neutralise the effect of *Littlewood* v. *Wimpey & B.O.A.C.* [1953] 2 Q.B. 501, and bring the Air Corporations into line with the other post-war, public commercial corporations. The effect of *Littlewood's* case in this respect is equally negated by the new enactment.

[7] It is, of course, open to them, as to other litigants, where suitable, to contract out of the limitation periods laid down by these Acts.

[8] Repealing the exception in the Crown Proceedings Act, 1947, s. 30 (1).

[9] S.I. 1952, No. 158.

[10] S.I.s 1953, Nos. 1206 and 1474.

Minister is required to have regard to certain vague qualifications in his appointment; and membership of the House of Commons disqualifies. Members of the Authority are paid and a statement of the details of payment must be laid before Parliament. Also, if a member (other than the chairman) "is employed about the affairs of the Authority otherwise than as a member thereof," he is paid extra. But (and this provision is not to be found in the nationalisation Acts, though it has its counterpart in local government) members must disclose interests in contracts and may not participate in any discussion or decision thereon. Why is this limited to contracts? Why not include other matters as does the Local Government Act, 1933?

It was, no doubt, the nature of the subject-matter that led to a provision wholly new in this type of statute: Except with the consent of the Lord President, the Authority shall not terminate on security grounds the employment of any officer of, or person employed by, the Authority. After much parliamentary discussion, the phrase "security grounds" is defined in the Act to mean grounds which are grounds for dismissal from the civil service under arrangements in force relating to dismissals for reasons of national security. Such dismissal would be a political jumping cracker. In theory, to fix the Minister with responsibility makes him clearly accountable to Parliament and ensures the minute examination of each case. But would the Minister refuse to answer questions on the ground that disclosure would not be in the public interest?

The Act requires the Authority to take over from the Lord President his general powers under the Atomic Energy Act, 1946, and the Radioactive Substances Act, 1948, and empowers the Authority in wide terms, under six heads, to exercise its functions of producing, using and disposing of atomic energy and radioactive substances. The Authority may not, save in accordance with arrangements made with the Ministry of Supply, develop or produce weapons although it may, of course, make experiments which may result in improved types of explosive nuclear assemblies for atomic weapons.

The Lord President retains his general duty to promote and control the development of atomic energy and this now includes "the duty of securing that, in the conduct of the affairs of the Authority, the proper degrees of importance are attached to the various applications of atomic energy." This is the best example to be found in the Acts establishing public boards and their relations with Ministers of a general description of the sort of power which the Government intends to exert, forced, quite purposelessly, into the legal phraseology of rights and duties. As a legal *definition*, and therefore *limitation* of power, the words quoted are valueless. As describing one matter on which the Minister intends to interfere

they are needlessly inelegant. It will be noted that they are made part of a general duty. In the following subsections, (a) the Lord President is empowered to give the Authority "such directions as he may think fit"; (b) the directions may be general or particular; and (c) the Lord President "shall not regard it as his duty to intervene in detail in the conduct by the Authority of their affairs unless in his opinion overriding national interests so require." The power in (a) is as wide as it could be, far wider than that in the nationalisation Acts and giving to the Minister an absolute discretion in the scope and nature of his directions; this is confirmed by (b) and then denied, perhaps, by (c). This part—(c) above—is again drafted as though it concerned limitation of power by law. The Lord President has a "power" to give directions which may be particular (and therefore, one would have thought, detailed) but this power is not to include a "duty to intervene in detail." It is unusual, to say the least, for a power to embrace a duty; but the answer lies in the confusion of legal and political phraseology and responsibility. Although the Act says that the Lord President "shall not" regard something as his duty, the words are empty of legal significance; they are completely unenforceable even if the "unless, in his opinion" clause (above) were omitted. "Power," "duty" and "shall not" are words here descriptive of political relationships and responsibility; they are not lawyer's words at all. What these particular words will lead to in terms of the Minister's accountability to Parliament is deep in mystery. The generality of (a) and (b) above would indicate complete accountability (compare regional hospital boards). What effect has (c) on this? A Member wishes to ask the Minister a question on a particular matter. On existing precedents the wording of (a) and (b) could not, I think, be interpreted by the Clerks as entitling them to refuse to accept the question even if the Minister had given no direction in fact. The argument would be that he has the power to do so and therefore the responsibility. But if the Lord President refuses to answer on the ground that any action on his part would amount to "intervention in detail," probably similar questions would not be accepted by the Clerks. All this can easily lead to greater power and less accountability so far as the Minister is concerned.

There is, indeed, one most important difference on this matter of Ministerial responsibility between the Authority and the nationalised boards. In the case of the Authority, to quote the Minister of Works during the Committee stage in the Commons, "policy is firmly in the hands of the Minister. . . . Therefore, the members of the Authority are more like general managers than like board directors."[1] Will the representatives of the national shareholders be denied information by the Minister-director on the

[1] 525 H.C.Deb. 5s. col. 395.

ground that the matter is one which it is for his general managers to decide?

The financial provisions are relatively simple. The Lord President, with Treasury consent, meets the expenses of the Authority and can direct how any income is to be spent. The Comptroller and Auditor General examines the accounts.

This Act tries to clarify the legal relationship of the Authority and the Crown. It provides that "any land occupied by the Authority shall be deemed, for the purposes of any rate on property, to be property occupied by or on behalf of the Crown for public purposes." There was presumably some good reason for this formulation though it would seem to be simpler to exempt the Authority expressly from liability to pay rates. The formulation might cause difficulties, for it is possible to argue that a Crown servant may hold property for "public purposes" which, not being Crown purposes, render the servant liable to pay tax (see Denning L.J. in *Bank voor Handel en Scheepvart N.V.* v. *Administrator of Hungarian Property* [1953] 1 Q.B. 248 at 296). The Authority is expressly exempted from the payment of income tax in stated cases. Finally, it is declared that, save as otherwise expressly provided, "the Authority are not to be treated for the purposes of the enactments and rules of law relating to the privileges of the Crown as a body exercising functions on behalf of the Crown." The Act therefore, like its predecessors, refuses to state flatly whether the Crown is to be regarded as the master or principal of the Authority and its employees for the purposes of liability. The Authority is itself a body corporate and is suable, but the major difficulties of legal status remain.

Most of the points taken in this note are legal or constitutional. The principal political argument was whether it was wise to transfer power from the Ministry of Supply (whose main functions in this field under the Atomic Energy Act, 1946, and the Radioactive Substances Act, 1948, were transferred in December, 1953, to the Lord President of the Council) to the new Authority. The Government followed the advice of the Waverley Committee (Cmd. 8986), and decided to remove the industry from the civil service because, according to Sir David Eccles, "there could hardly be a worse subject to be meticulously administered according to past decisions."[2] Arguments about the merits of nationalisation will no doubt continue, but the public corporation (nationalisation model) has become a universally popular device.

J. A. G. Griffith.

2 524 H.C.Deb. 5s. col. 847

NOTES OF CASES

The Crown and the Taxpayer—A Dutch Treat

In *Bank voor Handel en Scheepvart N. V.* v. *Administrator of Hungarian Property* [1952] 1 All E.R. 314[1]; [1953] 1 Q.B. 248, 279; [1954] 2 W.L.R. 867, the facts were involved but not particularly important to the decisions in the Court of Appeal and the House of Lords. Gold to the value of £2m. came into the hands of the Custodian of Enemy Property who sold it and purchased Treasury bills at a discount, paying income tax on the profits made. Subsequently the owner of the gold—a Dutch banking company—obtained judgment for the amount of the proceeds of the sale and claimed that the income tax paid (more than £76,000) should not be deducted arguing that the custodian, being a Crown servant, was not liable for and ought not to have paid the tax. Devlin J. accepted the company's contention; the three members of the Court of Appeal unanimously reversed his decision, and the House of Lords by three votes to two restored the first judgment. When four of Her Majesty's judges are of one opinion and five of another opinion and the minority, being more strategically deployed, win the day, the case deserves consideration.

Devlin J. proceeded thus. The custodian, not being a corporation sole, must be thought of simply as the person who for the time being holds the office. The beneficial ownership of property vested in him is suspended and he has such powers of dealing with the property as the statute gave him. He is a trustee with no beneficiary. Examining the position of the custodian, the learned judge found nothing conclusive in the fact that he was appointed by the Board of Trade, paid out of the Consolidated Fund and subject to a large measure of control by the Board. Indeed, he found that the fact that the Board's powers to give directions to the custodian were limited to the scope and purpose of the statute tended to negative the inference that the custodian was a Crown servant since "the power to direct a servant how to perform his duties is normally at large." Devlin J. found that the custodian had Crown status because his statutory duties brought him within the sphere of "two of the most ancient and peculiar prerogatives of the Crown—the power to make war, including the power to take for itself the property of an enemy found within the realm, and the power to make peace."

In the Court of Appeal, Sir R. Evershed M.R. argued that the office of custodian was not of itself sufficient to confer on its holder

[1] For an earlier note, see 15 M.L.R. 355.

the immunity belonging to the Crown (the office not being one derived directly and historically from the King in person). Moreover, since the interests of the company continued to exist—though suspended—it could not be said that the sums were held by the custodian exclusively for public purposes. Nor would his lordship accept that the duties of the custodian were " manifestations of the Sovereign's war-making prerogative." His lordship concluded by arguing that since the company was entitled to the " fruits " which the principal sum had earned, it should, in common sense, also be liable to tax thereon. Denning L.J. said : " The reason why public revenue is exempt from tax is because there is no point in the Crown taking money from one pocket and putting it in another . . . A study of the Trading with the Enemy Acts shows that his [the custodian's] income does not go in aid of the public revenue at all. It is held in suspense pending later arrangements. As such it is not exempt from tax." The activity in question must be a Crown activity as well as being performed by a person having Crown status before the question of immunity can arise; moreover " the activity must be such that the Crown purposes would be prejudiced unless immunity were afforded to it." " Crown status " attaches to Ministers, to Government Departments of which they are the heads and to servants of those Departments; also to those who act exclusively for " Crown purposes " though the extent of that phrase is uncertain. Although the Custodian of Enemy Property probably has Crown status, his activities are not Crown activities but his own. He does not hold money on behalf of the Crown. " He is a public officer carrying out public purposes; but they are not Crown purposes."

Romer L.J., on the other hand, regarded " the purposes of the Crown " as synonymous with " public purposes " but held that as the property might be restored to the owner it was impossible to say that it could only be properly applied to such purposes. The appeal was therefore allowed. So, on to the House of Lords.

Lord Reid, Lord Tucker and Lord Asquith made up the majority group which allowed the appeal. Lord Reid held that the custodian was a servant of the Crown because of the considerable powers exercised over him by the Board of Trade and because he had no " substantial independent discretion " under the statute. " The question is not how much independence the custodian in fact enjoys but how much he can assert and insist on by reason of the terms of his appointment or the nature of his office." The statutory power of the Board of Trade to appoint custodians was bestowed, in the words of the Act, " with a view to preventing the payment of money to enemies and of preserving enemy property in contemplation of arrangements to be made at the conclusion of peace." These arrangements, said Lord Reid, were not limited to returning all property to its former owner; there was, therefore, " a Crown

purpose which gave the Crown a sufficient interest to invoke its immunity if it chose to do so." The sentence which perhaps most clearly, in this judgment, pointed to the disagreement with the judgments in the Court of Appeal was: "I can find nothing to justify the argument that Crown immunity can only be claimed by the Crown (or its servants on its behalf) if it is required to protect some direct or financial interest of the Crown; and still less can I find any support for the argument that immunity cannot be claimed by the Crown unless the Crown alone is interested in the benefit which it will bring." Lord Tucker arrived at the same conclusions by much the same path. So also did Lord Asquith who, having held that the custodian was a Crown servant, said: "The Crown has in effect an unlimited power of disposition" over the property.

For the minority, Lord Morton agreed that the custodian was a Crown servant but decided that he could only claim immunity if the income was wholly applicable for "the purposes of the government of the country," quoting Lord Blackburn in *Mersey Docks and Harbour Board Trustees* v. *Cameron* (1864) 11 H.L.C. 443. At the relevant date the duty of the custodian was merely to hold the property, pending the subsequent "arrangements," which might direct him to transfer it to the previous owner, whose beneficial interest was in suspense, or for some other person. Therefore immunity could not be claimed. Lord Keith was not prepared to accept that the custodian was a Crown servant. "All I can find to say of him, looking solely at his status," he said, "is that he is a statutory official." His immunity could be decided "only by examining the purposes for which he received the income and his duties in regard to it when it came into his hands," and by showing that "he received and held the income for the Crown, or for the purposes of the government of the country, so as to be deemed part of the use and service of the Crown." Now, "it may be conceded that withholding money from the enemy is a Crown purpose, but this is something quite different from saying that it is being held for the Crown, to be used or expended in the functions of government." Lord Keith rejected the argument that the Crown had the sole power of disposition of the property. He could find no authority for such power of confiscation.

The decision thus turned finally on the question: Was it necessary that the income should be wholly applicable for the purposes of the Government or was it sufficient that the Crown had some power of disposition? One of the peculiarities of the case was that although their Lordships continually referred to the Crown "claiming immunity," immunity was precisely what the Crown was seeking to deny. As Lord Reid said, if the Crown had waived any immunity it might have had, the tax would have been properly payable and the appellants would have been unable to complain.

He continued that by reason of the form of the concession made by the Crown "we have only to consider whether the Crown had a right to assert its immunity." Lord Reid held that the Crown had this right and that therefore the appellants must succeed.

At the beginning of his judgment Lord Reid said that the "sole question" before the House of Lords was whether the custodian "was liable to pay that tax." Lord Morton said that the "only question" was whether the custodian "was bound to pay that tax or whether he could have claimed immunity by the application of the general principle that the Sovereign, by virtue of the prerogative, is exempted from income tax." Lord Tucker said that the "only issue" was whether Crown immunity could have been successfully claimed by the custodian. Lord Asquith said that the "only issue" was whether the custodian could have successfully resisted payment of income tax. Lord Keith said that the question was whether the custodian was immune from payment of tax.

The reason why the Crown can claim immunity from the payment of tax is surely the futility of taxing the taxmaster. It does not seem to have any necessary or logical connection with another rule which has emerged for other reasons, namely, that the Crown is not bound by statutes unless expressly named or where there is a necessary implication. It may be that this second rule, being in its application one of statutory interpretation, can be pleaded by persons other than the Crown; it can be said to be a general rule of law. The frequently cited cases on the immunity of the Crown from the payment of local rates seem to be an application of this second rule, for the rates, if paid, will not accrue to the Crown and therefore it is not the taxmaster who is being taxed. But is it true that the immunity of the Crown from the taxes levied by the Crown and accruing to the Crown is equally a general rule of law? Can it not be said that this immunity is one which only the Crown can plead? If so, then, whatever concessions may be made in argument, is not the question determined by the courts in this case doubly hypothetical? There is the hypothesis: if the Crown had claimed immunity—which it had not; and there is the hypothesis: if the subject has a right to claim that the Crown could have claimed immunity—which I suggest the subject has not.

The House of Lords could have solved the problem thus: the question is whether the tax was properly paid; if the property was not Crown property, then it was taxable; if the property was Crown property, the further question is whether the Crown can pay tax on its own property, to which the answer is: "Yes, if it amuses the Queen."

J. A. G. Griffith.

"For the Purposes of the Trade"

The Income Tax Acts wisely do not attempt to define "profits" or "income." A person carrying on a trade is taxed simply on the "profits or gains arising or accruing" from the trade.[1] The Acts do not say how profits are to be calculated, but the courts have decided that the calculation is to be in accordance with ordinary commercial principles.[2] Ordinary commercial principles allow certain expenditure to be charged against gross receipts for purposes of calculating profits. The law accepts this practice for income tax purposes, but lays down a code of prohibitions which forbid the deduction of certain kinds of expenditure[3]; one of these prohibitions forbids the deduction of any expenses "not being money wholly and exclusively laid out or expended for the purposes of the trade."[4]

The question for decision in *Morgan* v. *Tate & Lyle, Ltd.*[5] was simply whether this prohibition covered expenditure by the company upon the anti-nationalisation campaign which featured "Mr. Cube." The company claimed that ordinary commercial principles required the deduction of this expenditure from gross income receipts in order to compute net profits. In the House of Lords at least this claim appears to have been accepted on behalf of the Crown[6]; and the issue was argued, and decided, as a question of interpretation of the rule quoted above.

The interpretation of this rule has been a fertile source of litigation and of decisions in which fine distinctions are of decisive importance. *Morgan* v. *Tate & Lyle, Ltd.*[5] was no exception. Both the company and the Crown relied strongly upon a short passage taken from the speech of Lord Davey in *Strong & Co. of Romsey, Ltd.* v. *Woodifield*,[7] in which he discussed the meaning of the words "for the purposes of such trade" in the corresponding provision in the Income Tax Act, 1842. He said: "These words . . . appear to me to mean *for the purpose of enabling a person to carry on and earn profits in the trade.* . . . It is not enough that the disbursement is made in the course of, or arises out of, or is connected with, the trade, or is made out of the profits of the trade. It must be made *for the purpose of earning the profits.*"[8]

[1] Income Tax Act, 1952, s. 122 (formerly Income Tax Act, 1918, Schedule D, Rule 1).

[2] See, *e.g.*, Lord Maugham in *Lowry* v. *Consolidated African Trust, Ltd.* [1940] A.C. 648 at 661. See, too, an article on profit calculation for tax purposes, by H. C. Edey at 17 M.L.R. 229.

[3] Income Tax Act, 1952, s. 137.

[4] *Ibid.*, s. 137 (*a*) (formerly Income Tax Act, 1918, Schedule D, Cases 1 and 2, r. 3 (*a*)).

[5] [1954] 3 W.L.R. 85, H.L.

[6] But not in the courts below, where it was argued that the expenditure was really of a capital nature and therefore not chargeable against income receipts: see [1953] Ch. 601 at 609.

[7] [1906] A.C. 448.

[8] At p. 453 (author's italics).

One of the fine distinctions upon which *Morgan* v. *Tate & Lyle, Ltd.*[8] was argued and decided turned upon what was said to be a difference between the two sets of italicised words in the quotation from Lord Davey's speech set out above. The argument for the Crown was that the expenditure was not "for the purpose of earning the profits" and that these were the key words in Lord Davey's speech; but this argument was rejected by the majority in the House of Lords, who insisted on the importance of the earlier words "for the purpose of enabling a person to carry on and earn profits in the trade."

But it is not enough that the expenditure should be for this purpose: it must be "wholly and exclusively" for this purpose. Accordingly it was necessary to analyse the purposes of the taxpayer in making the expenditure. This was complicated by the fact that the taxpayer was a company; and, although the purposes of the directors and the shareholders had to be examined in order to ascertain the company's purposes, this inquiry had to face the fact that, in legal theory, the company's purposes are not necessarily those of its officers and shareholders. Expenditure proposed and authorised in order to secure the continued ownership of the company by its present shareholders could not be treated as laid out for the purposes of the company or its trade. So, if the nationalisation proposed by the Labour Party for the sugar industry had been in the form of a proposal to acquire by compulsory purchase all the shares and stock of the sugar companies, expenditure upon a campaign to resist that proposal would clearly have been for the purposes of the shareholders and not for the purposes of the company or its trade. This was conceded on behalf of the company.[9] Fortunately for the company, the Labour Party's proposal did not specify the form of nationalisation, and the company's principal witness, Lord Lyle, stated that he had never contemplated this method of nationalisation by compulsory acquisition of stocks and shares.

To the political theorist or layman unversed in legal theory and in the niceties of statutory interpretation, it might well seem astonishing that the answer to so important a question could be decisively affected by the *form* of the proposal for nationalisation.[10]

However there is another distinction in the case which illustrates most clearly the way in which a political issue can be transmuted, in the law courts, into a quiet intellectual exercise in the analysis of the meaning of words. In the ordinary case, expenditure by a trader to protect his trade or his trading assets is expenditure which benefits himself and his successors in that trade. In the present case the evidence was that the company's purpose was to protect its trade against the injury which it feared might result

[9] [1954] 3 W.L.R. at 89.
[10] An attitude shared by Lord Keith of Avonholm: [1954] 3 W.L.R. at 112.

from nationalisation. Such a purpose could not be said to coincide with the interest of any body which might have been established to run the sugar industry after nationalisation. It was, nevertheless, a purpose connected with the company's trade and not simply with the company's ownership of that trade. And, indeed, one of the Law Lords held that, though the sugar *industry* must necessarily continue after nationalisation, the *trade* in sugar carried on by the company might well be discontinued.[11]

To a lawyer, therefore, it is not surprising that another Law Lord regarded the decision in the case as, simply, a decision upon the meaning of the words " the trade " in the rule quoted at the beginning of this note.

Enough has been said to indicate that, although this was a decision in the very technical field of tax law, it is nevertheless of great interest to students of the nature of corporate personality, of statutory interpretation, and of the legal methods of the English courts.

Leolin Price.

When is a " Shop " not a Shop?

> " When *I* use a word," Humpty Dumpty said in rather a scornful tone, " it means just what I choose it to mean —neither more nor less."
>
> " The question is," said Alice, " whether you *can* make words mean so many different things."
>
> " The question is," said Humpty Dumpty, " which is to be Master—that's all."

If we substitute " Parliament " for Humpty Dumpty and " the courts " for Alice this dialogue may be said to summarise the point of *Deeble* v. *Robinson* [1953] 3 W.L.R. 975, where many may think that Parliament suffered much the same fate as later befell Humpty Dumpty. The Leasehold Property (Temporary Provisions) Act, 1951, gives a tenant of a shop a right in certain circumstances to apply for a new tenancy and says that " shop " means " premises occupied wholly for business purposes, and so occupied wholly or mainly for the purposes of a retail trade or business." The applicant applied under this Act for a grant of a new tenancy of a shed used as a dairy. No milk was sold at the shed but from it the applicant ran a milk round. Clearly the shed was not a shop in the popular sense; equally clearly it fell within the literal terms of the statutory definition, for it was occupied " wholly for business purposes " and " for the purposes of a retail trade." Since the legislature had chosen expressly to exercise the prerogative of Humpty Dumpty, and since Parliament is said to be Master,

[11] [1954] 3 W.L.R. at 107, 108, *per* Lord Reid.

one might have supposed that there was no room for argument. But in fact the county court judge held that the shed could not be regarded as a shop and that accordingly the applicant had no right to apply for a new tenancy. By a majority the Court of Appeal upheld his decision.

As the majority consisted of Somervell and Romer L.JJ. and the dissentient was Denning L.J., the decision, at first glance, shows these members of the Court of Appeal reversing their normal approaches towards questions of statutory interpretation; Lords Justices Somervell and Romer rejected the literal interpretation and Lord Justice Denning supported it. On closer examination, however, it is clear that all three members remained true to character. The majority decided as they did because they believe in applying a narrow construction to Acts of Parliament ("plain words are necessary to establish an intention to interfere with common law or contractual rights" [1]), and Lord Justice Denning adopted the view he did because he believes in a liberal interpretation which in this case happened to coincide with the literal ("in this case the literal interpretation coincides with what is just and reasonable" [2]).

Both sides, of course, paid lip-service to the need to ascertain the intention of Parliament, but, as always, this meant little or nothing. The Parliamentary Debates on the Bill make it pretty clear that no one visualised the state of affairs that arose in *Deeble* v. *Robinson*. Had Parliament done so they would probably have wished it to be covered (to this extent Lord Justice Denning seems to be right). On the other hand, had they asked themselves whether the Bill covered premises which were not shops in the popular sense, they would probably have thought not [3] (to this extent the majority may be right).

Leave was given to appeal to the House of Lords, and their Lordships' reaction to this problem should be interesting. Should they uphold the "narrow-popular" rather than the "liberal-literal" interpretation, those who still believe in consistency may fairly ask why a "shop" can only be a shop in the popular sense whereas a "settlement" (and in a taxing statute too!) can be something no one would recognise as a settlement.[4]

L. C. B. G.

Obscene Publications

The judgment of Stable J. in *R.* v. *Martin Secker & Warburg, Ltd. and Others* [1954] 1 W.L.R. 1138 has rightly been acclaimed in

[1] *Per* Somervell L.J. at p. 979.
[2] At p. 980.
[3] The Law Officers constantly reiterated that the Government were determined to keep "within the ambit of what can properly be described as a shop": see, *e.g.*, H. C. Debs., 5th Series, 1950, Vol. 484, Col. 1503.
[4] *Thomas* v. *Marshall* [1953] A.C. 543, H.L.

the national Press for the enlightened attitude it adopts to a problem which has long been meeting with harsh and intolerant treatment in the criminal courts. It will do much to reassure those who fear that the criminal law applied today by the judges of the Queen's Bench is too often out of touch with public opinion and that little or no effort is made to avoid or nullify the technicalities and anomalies in which the law abounds.

The problem of criminal censorship is not one which lends itself to a simple legal solution. The need to suppress pornography requires careful treatment lest the measures adopted undermine and destroy the freedom which society accords the creative artist. The difficulty lies not so much in distinguishing the pornographer, who writes or publishes with the purpose of exciting and exploiting the sexual impulses for commercial motives, from the artist who finds elsewhere an inspiration which it may be difficult for the layman to comprehend and assess. The real difficulty arises at a later stage in determining at what point a work which is not created or published with pornographic intent so oversteps the bounds of decency as to merit prohibition, destruction and perhaps the visitation of criminal penalties on its author and publishers. It is a problem which, in the words of Stable J., is " of very real importance to the accused and to those individuals who are associated with them. It is of importance to authors who, from their minds and imagination, create imaginary worlds for our edification, amusement, and sometimes, too, for our escape. It is a matter of importance to the community in general, to the adolescent, perhaps, in particular. In addition to that, it is of great importance in relation to the future of the novel in the civilised world and the future generations who can only derive their knowledge of how persons lived, thought and acted from the contemporary literature of the particular age in which they are interested."

The English law as interpreted by the courts has long appeared singularly inappropriate for dealing with the problem. It is usually invoked by a complainant conforming to the Obscene Publications Act, 1857, s. 1, and swearing on oath before a stipendiary magistrate or two justices of the peace that he has reason to believe that obscene matter is being kept on certain premises for the purposes of sale, hire, etc. If the magistrates are satisfied that it constitutes a proper case for action, the suspect publications are seized and examined and a summons may then be issued requiring the occupier of the house to show cause why the articles be not destroyed. This procedure throws a heavy burden on the householder and is open to abuse in the hands of lay magistrates who may be as bigoted or narrow-minded as the complainant who sought them out and persuaded them, in the absence of the householder, to issue the summons, without being required to indicate the obscene passages. The test of obscenity, which lies at the root

of the matter, is the same as that adopted for the more serious offence of publishing an obscene work, a charge which is at least partially safeguarded by a trial before a jury and a qualified judge or recorder and in which the onus of proof rests squarely on the prosecution. It is extracted from a mid-Victorian decision of Cockburn C.J., *R.* v. *Hicklin* (1868) L.R. 3 Q.B. at p. 371, " whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall."

As recently as March of this year, in the case of *Reiter* [1954] 2 Q.B. 16, concerning a prosecution for uttering and publishing obscene libels, the accused appealed on the grounds that the Recorder had misdirected the jury by telling them in his summing-up that it would be wrong in applying the *Hicklin* standard of obscenity to take into consideration the standard or trend of literature published and sold at the present time. In delivering the judgment of the Court of Criminal Appeal dismissing the appeal, Lord Goddard C.J. reaffirmed that the law today is the same as it was in 1868 and, speaking of the tendency to deprave and corrupt, stated that " when one is considering whether they have such a tendency, one's mind naturally turns to depraving or corrupting young people into whose hands they may fall. . . . The jury have to consider whether, looking at these books altogether, they would tend to corrupt and deprave them or whether they would not." The only way of judging the obscenity of the works was to examine them : the character of other books was a collateral issue.

In the instant decision, however, Stable J., whilst agreeing that the test in *Hicklin* was still applicable today, left no doubts as to his interpretation of the dictum. It was irrelevant to consider whether the court and jury nearly a century ago would have reached the conclusion that the work in question was obscene or not. The standards as to what were proper subjects for discussion and description had changed since Victorian days and the legitimate task of the contemporary novelist was to hold up a mirror to the society of his own day. In point of fact, the learned judge declined (*sub silentio*) to adopt the contrast between frank discussion and description to which Lord Goddard had adverted in *Reiter*. To his own question as to whether literary standards were to be governed by what was suitable for the young, decent, female adolescent, Stable J. answered emphatically : " Of course not. A mass of literature, great literature, from many angles, is wholly unsuitable for reading by the adolescent, but that does not mean that a publisher is guilty of a criminal offence for making those works available to the general public."

This courageous and enlightened decision will rank as highly as that of Judge Woolsey in 1933 in a United States District Court, lifting the ban on James Joyce's *Ulysses*, for the service it has

rendered to the cause of free letters. In both, the proper test of whether a given book is obscene would seem to be its dominant effect and, to quote the American judge, " whether a particular book would tend to excite such impulses and thoughts must be tested by the court's opinion as to its effect on a person with average sex instincts—what the French would call *l'homme moyen sensuel*. . . ." Nothing can point the way to a proper solution of the problem more fittingly and sensibly than the words of Stable J. in the concluding paragraph of his direction to the jury :

> " The literature of the world from the earliest times when people first learned to write so far as we have it today—literature sacred and profane, poetry and prose—represents the sum total of human thought throughout the ages and from all the varied civilisations the human pilgrimage has traversed. Are we going to say in England that our contemporary literature is to be measured by what is suitable for the fourteen-year-old schoolgirl to read? "

S. Prevezer.

Damages for Wrongful Expulsion from a Trade Union—a Further Comment

The following remarks about the problem in *Bonsor* v. *Musicians' Union* [1954] 2 W.L.R. 687 are merely a footnote to the illuminating discussion by Mr. Dennis Lloyd in 17 M.L.R. 360, and by Professor Goodhart in 70 L.Q.R. 322 and Mr. T. C. Thomas in *The Law in Action* 45; but the importance of the case is such that every possibility seems worth express mention. Even assuming that a trade union is not an entity capable of contracting with its members, it is arguable that a member who has been wrongly expelled by a committee or an official can recover damages for breach of contract from the union funds. The chief argument to the contrary is founded on the doctrine of agency. It is said that the committee act either without authority (in which case there is no vicarious liability) or with the constructive authority of all the members (including the plaintiff himself). This difficulty is avoided if agency is not imported artificially into the question. It seems natural to regard the members as contracting *inter se* simply that none may be expelled except in accordance with the rules. On this view, the committee when exceeding their powers act, as Denning L.J. suggests in *Bonsor's* case at p. 712, neither as agents of the plaintiff nor as agents of the other members. The expulsion, however, causes a breach of contract, and the plaintiff is entitled in effect to a charge on the common fund for consequential loss that is not too remote.

A member of a registered union could apparently enforce such a right by suing the union in its registered name and either joining the trustees as defendants or taking separate proceedings against

them. An action so constituted is not precluded by the mere fact that the plaintiff is a member of the union, for *Bonsor's* case is but one of a formidable line of authorities in which relief (by way of declaration and injunction) has been granted to members against registered unions. Unless it be conceded that the union is a separate entity, this procedure seems explicable only on the basis, suggested by some observations of Jenkins L.J. at p. 721, that use of the registered name is allowed as a convenient alternative to naming all the other members as defendants. So regarded, the procedure is analogous to that under R.S.C. Ord. 48A, r. 10, whereby, provided that a cause of action exists, the firm name may be used in actions between a firm and one or more of its members or between firms having members in common: see Lindley on *Partnership*, 11th ed. 348, and Pollock on *Partnership*, 15th ed. 24, 136. In the case of an unregistered union with a common fund an action may lie against representative defendants. The usual obstacle to such an action is that examined by Mr. Lloyd in 12 M.L.R. 416 and 16 M.L.R. 359, namely the availability of different defences. This obstacle does not appear to arise when all the members, at whatever date they joined the association, are in contractual relationship and the contractual obligation is absolute.

R. B. Cooke.

Valuation of a Deceased Bigamist

In *Shaw* v. *Shaw* [1] the Court of Appeal (Singleton, Denning and Morris L.JJ.) decided [2] that it is not contrary to public policy to uphold an action for breach of promise of marriage given by a married man, provided the woman plaintiff did not know that he was married. This had previously been the view prevailing here, if without any great firmness, unbuttressed as it was by any reported decision for more than a hundred years.[3]

The interesting and controversial part of the decision concerns the measure of damages recoverable where, in apparent fulfilment of the promise, a man goes through a ceremony of marriage with the plaintiff, which is bigamous because his lawful wife was alive at all the relevant times. In *Shaw* v. *Shaw* the man had died intestate fourteen years later, predeceased by the lawful wife, and the Court of Appeal held that the woman plaintiff was entitled to damages which would put her in roughly the same financial position as if she had been his widow on an intestacy.

The decision seems likely to produce a progeny of moot questions. What difference would it make, for instance, if the lawful

1 [1954] 3 W.L.R. 265.
2 Reversing Pilcher J.'s decision at first instance.
3 The last reported decisions in this country were *Wild* v. *Harris* (1849) 7 C.B. 999, and *Millward* v. *Littlewood* (1850) 5 Exch. 775, but three decisions in the United States were cited in argument.

wife had survived her husband, and the woman plaintiff's claims for breach of warranty (of marriageability) and breach of promise of marriage clashed directly with those of the surviving lawful spouse? It is arguable that here the wife must accept the disadvantages as well as the advantages of the married state, and bear the resulting loss no less than she would have done if her marriage had taken place after and in breach of the man's promise to marry another. But the courts might well pause before granting such damages to a plaintiff at the direct expense, for example, of a deserted wife.

Can it, moreover, be argued that the breach of warranty and of promise of marriage (implemented in appearance though not in law) would create a trust in favour of and enforceable by any children of the bigamous union? They, after all, are the chief sufferers from any such fraud, but to them there is no warranty and no promise.

One point on which the members of the court were unanimous was that, as Singleton L.J. put it: "the damage which [the plaintiff] sustained did not arise, or accrue, until after [the man's] death," or in the words of Denning L.J.: "The most important breach of all was at the moment of his death, because when he died she was not his widow, as she thought she was." Clearly the court considered that in the given circumstances the man was worth more to the plaintiff dead than alive. To import into a promise to marry a woman a warranty that she will be left a widow might appear, at first sight, an extension of normal intention, although such a result may be reasonably foreseeable in view of the disparity in expectation of life between the sexes. But further difficulty would seem to arise over the warranty of predecease intestate. Notwithstanding the Inheritance (Family Provision) Acts, 1938–52, a large measure of freedom to disinherit a spouse by testamentary disposition remains, but here again reasonable foreseeability might prove a helpful test, since the evidence which formed the foundation for the Intestates' Estates Act, 1952, was that such post mortem deprivation was unusual.

In sum, it seems likely that the decision will provide a basis for the exercise of considerable ingenuity by practitioners and students alike, and some distinguishing on the facts of the case may be anticipated.

O. M. Stone.

The Deserted Wife's Necessaries—Costs

In *Cale* v. *James* [1897] 1 Q.B. 418 a woman was unsuccessful in her application for an order under the Summary Jurisdiction (Married Women) Act, 1895, s. 5, on an allegation of persistent cruelty by her husband causing her to leave him. That section empowered the court of summary jurisdiction (*inter alia*) to make

provision for payment of costs by the applicant or the husband, or both of them. The court did not make and had not been asked to make any such provision. The solicitor acting for the wife sued the husband for his costs and obtained judgment in the county court. The Divisional Court reversed this judgment on the ground that the object of the Act was to enable poor persons to obtain the court's protection without any great expense; the only machinery for recovering costs in such cases, therefore, was that provided by the Act. The decision set up an exception to the common law rule that a deserted wife (or a wife compelled by her husband's misconduct to leave him) may pledge her husband's credit for the costs of legal proceedings between them. A slight hint of doubt about the correctness of the decision seems to have been shown by McCardie J. in *Michael Abrahams, Son & Co.* v. *Buckley* [1924] 1 K.B. 903, 913, and by Atkin L.J. in *Durnford* v. *Baker* [1924] 2 K.B. 587, 600. Today it may be doubted whether the decision would have been the same way since the case of *Sandilands* v. *Carus* [1945] 1 K.B. 270. There the Court of Appeal held that even though a wife has obtained a maintenance order under the 1895 Act, and the husband regularly complies with the order, a person supplying the wife with necessaries can still claim the cost thereof from the husband. If the same conditions apply whether the necessaries are supplied by a tradesman, a landlady or a solicitor, it must follow that a solicitor is entitled to recover his costs from the husband. The fact that the Act is a poor persons' Act did not bar the claim in *Sandilands* v. *Carus*. Nor would it have been an answer that the husband's present means did not enable him to pay for the necessaries –*per* du Parcq L.J. at pp. 276, 277.

In *J. N. Nabarro & Sons* v. *Kennedy* [1954] 3 W.L.R. 296, a husband who had left his wife issued a summons under the Married Women's Property Act, 1882, s. 17, in respect of the title to certain moneys and to the lease of the flat which had been the matrimonial home. In these proceedings he was largely successful and his wife was ordered to pay one-fifth of the costs. The solicitors for the wife however sued him for their professional charges. The husband resisted the claim, contending (a) that the common law rule did not apply to costs of proceedings under the 1882 Act; (b) that the wife could not pledge his credit because she had sufficient private means of her own.

On the first contention, Stable J. found good reason for the decision in *Cale* v. *James* and admitted that he would like to have applied it to the case before him if he had been able to do so. But he felt bound to distinguish it. Although section 17 provides that a judge of the High Court may make such order as to costs of and consequent to the application as he thinks fit, Stable J. held that that merely means that the court *inter partes* has complete jurisdiction over the costs. It had long been settled law

that the right to claim solicitor and client costs in such cases was not limited by the statutory right given under the Divorce Acts—*Brown* v. *Ackroyd* (1856) 5 E. & B. 686; *Rice* v. *Shepherd* (1862) 12 C.B.(N.S.) 332; *Ottaway* v. *Hamilton* (1878) 3 C.P.D. 393. That right could only be taken away by the express words or necessary implication of a statute. But section 17 is not concerned with the means or lack of means of the husband and wife—the reason given for the decision in *Cale* v. *James*. As Stable J. said (at p. 304): "The section really seeks, not to provide a poor man's court, but to get over the difficulty that a husband and wife in the eyes of the law of 1882 were deemed to be one." Indeed, although the question involved in the proceedings must be between husband and wife and must relate to the title to or possession of property, the application to the court may be made by a "bank, corporation, company, public body, or society . . . in whose books any stocks, funds, or shares of either party are standing."

The second contention of the husband was not established—there was no evidence that the wife ever possessed a penny piece. But Stable J. accepted the principle—now laid down by the Court of Appeal in *Biberfeld* v. *Berens*[1] [1952] 2 Q.B. 770—that a deserted wife who has adequate means of her own cannot pledge her husband's credit for necessaries. Yet, oddly enough, he rightly pointed out (at p. 298) that the wife's right to pledge her husband's credit for necessaries "derives not so much from necessity as from status," and distinguished her position from that of an agent who has authority to pledge the credit of his principal in some sudden emergency. But the foundation of the decision in *Biberfeld* v. *Berens*, and of all the dicta upon which it is substantially based, is that the wife is an agent of necessity when she is deserted. In the lower court, Lynskey J. had said that a wife could only be an agent of necessity if the necessity for that agency in fact existed. But there is no real parallel with the other cases of so-called "agency of necessity"; and it is fallacious to insist that the deserted wife must prove need before she can pledge her husband's credit unless either that parallel exists or there is some other justification in authority or principle.

Suppose that a man of moderate means marries a wealthy woman and later deserts her. If she has adequate means to provide for the standard of living set up in the former matrimonial home, the deserting husband cannot be compelled to pay for the necessaries of the household, for the maintenance and education of the children (*their* children), for medical services rendered to the wife in respect of illness which may have been caused by the husband's earlier cruelty, or for the professional charges of the solicitor who is ultimately engaged to assist the wife in getting a divorce. The husband, guilty though he may have been of the

[1] For a justification of this decision, see Mr. G. H. Treitel's note in 16 M.L.R. [1953] 221–5.

most infamous conduct towards his wife and family, can pass the whole financial burden to his wife if she has the wherewithal to support it. Nor is this conclusion avoided by saying, as Hodson L.J. said in *Biberfeld* v. *Berens* (at p. 787), that "the sufficiency of the means of the wife in each case is a matter of fact and degree." That is an independent issue; once it is proved that the wife has sufficient means to pay for the necessaries which otherwise would have had to be paid for by the husband, the whole burden will fall on her because there is no longer any necessity to make her an agent of necessity. Indeed the Court of Appeal even held that the wife's means as a whole have to be considered, so that in some cases it might even be possible to resort to her capital in order to discover whether there was a necessity for her agency. One wonders whether such principles as these would now be applied to other agents of necessity—so that the imperilled shipmaster would first have to disclose the contents of his private bank account and his capital savings before he can pledge the credit of the shipowner in a case of what would otherwise be necessity.

If it is considered that there is some justification for imposing a means test on the deserted wife, it ought to be equitable to impose such a test even more so upon the wrongdoing husband. Perhaps the third party who has supplied the necessaries should be compelled to sue husband and wife jointly, leaving the court to establish, on evidence of their means and such other circumstances as ought properly to be taken into account (*e.g.*, the circumstances of the desertion), in what proportion they should contribute to payment of the debts incurred. But first we must rid ourselves of the notion that the deserted wife is some kind of agent of necessity.

RAPHAEL POWELL.

TRESPASS OR NUISANCE OR NEGLIGENCE

Southport Corporation v. *Esso Petroleum Co.* [1953] 3 W.L.R. 773; [1954] 3 W.L.R. 200 raised interesting questions on the boundaries which separate different causes of action in tort. It shows that though we need no longer distinguish between forms of action we still have to be nice in distinguishing between causes of action. The defendants' vessel had developed a defect in her steering and ran aground. The master, fearing that the vessel would break up with loss of life and property, jettisoned the cargo of oil which was carried on to the plaintiffs' foreshore where it caused extensive damage. The plaintiffs based their action on trespass, nuisance and negligence. The action failed before Devlin J. but succeeded in the Court of Appeal by a majority decision which held that a case of negligence had been established.

The cause of action in negligence which succeeded can be shortly disposed of. The immediate cause of the grounding was the

unexplained fracture of the stern frame. Devlin J. took the view that as the only negligence alleged was negligence of the master in navigation, and he found none, the defendants were not bound to exculpate themselves from the suggestion of negligence in sending a vessel to sea with a defective stern frame, but the majority in the Court of Appeal preferred to ignore the formal pleading point and held that the maxim *res ipsa loquitur* applied to cast on the defendants the onus of providing an explanation why the stern frame fractured, and that in the absence of any explanation a case of negligence had been made out.

We can now turn to the two other causes of action, a decision on which did not become necessary in view of the success of the plaintiffs on the negligence issue. The defendants had denied the claim in trespass on the ground that there was no physical interference with the plaintiffs' property. Devlin J. and Morris L.J. inclined to the view that there was a trespass : Denning L.J. on the other hand, was satisfied that there was no trespass because a trespass must be a physical act done directly on the plaintiff's land, for which proposition he cited the *Prior of Southwark's Case* (1498) Y.B. 13 Hen. 7, f. 26, pl. 4, and *Reynolds* v. *Clarke* (1726) 1 Str. 634. But these two cases are concerned with the escape of matter from the defendant's close consequent on his activities there and not, as in the present case, with the deliberate expulsion by the defendant of matter which must reach the plaintiff's land. In *Smith* v. *Kenrick* (1849) 7 C.B. 515 at p. 559 Maule J., speaking of a case where water had flowed from one mine to another, said : " Nobody suggests that an action will not lie for wrongfully turning water into another man's mine." And *Gregory* v. *Piper* (1829) 9 B. & C. 591 is clear authority for the proposition that deliberately to put matter where natural forces will take it on the plaintiff's land is a trespass.

Devlin J. thought, however, that the prima facie case of trespass could be answered by invoking the well-known " traffic rule " of Blackburn J. laid down in *Fletcher* v. *Rylands* (1866) L.R. 1 Ex. 265, where he stated that traffic on the highways, whether by land or by sea, must expose those persons who are on the highway or have their property near it to the risk of accidental trespasses, and therefore such persons cannot recover without proof of negligence. It is submitted, however, that the " traffic rule " is restricted to purely involuntary trespasses and does not extend to cases like the present where the defendant acted deliberately. Devlin J. furthermore thought that a case of trespass might be answered by the defence that what was done was deemed necessary to save life, though he would not have been prepared to accept the defence of a necessity to save the defendants' property. There is very little authority on the validity of a defence of necessity to an action of trespass, but on principle it would seem that such a defence

ought not to be countenanced in civil proceedings. We must distinguish between the moral justification for doing an act and the legal privilege of doing that act at someone else's expense. We may approve an act done to save life, but there is no more justice in charging up to a stranger the cost of saving your life than there is in requiring him to foot the bill for your daily keep.

Devlin J. thought that there was also a prima facie cause of action in nuisance, and seemed to regard it as capable of being treated either as a private nuisance or a public nuisance. Denning L.J. refuted the suggestion that a case of private nuisance existed since the damage did not result from the defendants' user of their own land, but he was satisfied that the discharge of a quantity of oil in navigable waters was a public nuisance in respect of which the plaintiffs could sue as having suffered particular damage. Devlin J. would have excused the nuisance on the same grounds as he was prepared to excuse the trespass, *i.e.*, either on Blackburn J.'s " traffic rule " or on grounds of necessity.

The view of Denning L.J. that this could not be a private nuisance is to be preferred. The essence of the private nuisance is that the defendant has used his land in a manner which interferes with the plaintiff's enjoyment of rights over land. To extend the conception of private nuisance to the user of ships at sea or vehicles on roads would utterly confound the distinction between private and public nuisance. But even if there be a public nuisance here, are the circumstances such that the plaintiffs could sue in nuisance for the damage suffered? It may well be that, quite apart from modern legislation, the discharge of oil in navigable waters is an indictable nuisance, but the essence of a public nuisance to the highway is the interference with the public right of passage. The Southport Corporation were not complaining of any interference with a right of passage or right of access to these navigable waters : their complaint was of the infringement of a private right to have their foreshore undamaged, and to give them a remedy in such a case there is no need to invoke the term " nuisance " or the rules relating to nuisance actions. There is ample material for saying that persons who use the highway for purposes other than passage owe a distinct duty to prevent damage from their activities and though, for reasons given elsewhere (65 L.Q.R. 480), on historical grounds this duty ought not to be higher than a duty to take care, as the law stands at present the courts enforce the duty as a strict duty. If those who use the highway for suspending lamps (*Tarry* v. *Ashton* (1876) 1 Q.B.D. 314), piling stones (*Penny* v. *Wimbledon U.D.C.* [1899] 2 Q.B. 72), melting solder (*Holliday* v. *National Telephone Co.* [1899] 2 Q.B. 392) are strictly liable it would seem that the same liability should attach to those who use a navigable highway as a dumping ground for quantities of oil.

F. H. Newark.

REVIEWS

LEGAL CONTROLS OF INTERNATIONAL CONFLICT. By JULIUS STONE. [London: Stevens & Sons, Ltd. 1954. lv and 851 pp. £4 4s.]

THIS massive work by the Challis Professor of International Law and Jurisprudence in the University of Sydney is accurately described in the Preface as "a thoroughly modern legal textbook on disputes, peace enforcement, war and neutrality." It is divided into three parts. The first (which really ought to comprise the preceding Introduction) is headed Perspective and contains a broad statement of the author's views on the fundamental problems of international law. Book II deals with international disputes and peace enforcement and discusses, in particular, arbitration, judicial settlement of disputes and the provisions of the United Nations Charter for peace enforcement. Book III is the most substantial part, extending over more than half of the whole volume. It includes the law of war and neutrality in all its aspects. Throughout the work special problems of importance are discussed in Discourses of which there are thirty-four altogether. The material used by the author, though perhaps not exhaustive, is vast and drawn from the practice and literature of the principal countries of the world.

This short description will make it obvious that Professor Stone has produced a work which may be welcomed as one of the most important studies of international law that has appeared in recent years. None of its readers can help expressing satisfaction that the author of *The Province and Function of Law* has turned to international law and bestowed upon it the benefit of his acute mind, of his great learning and his genuineness of purpose.

The reason which prompted one who in the past seemed primarily interested in jurisprudence to apply himself to the most controversial branches of international law is not far to seek. It lay in the author's "deep sense of dissatisfaction, as a student of law and society, with the ever-widening incongruity between international law as formulated even on paper of the highest authority and the actual conduct of inter-State relations; between, in particular, its rules as formulated by publicists and its rules as applied by States officials" (Preface, p. vii).

These words also serve to indicate the author's general approach to his task. He subscribes to the method of sociology and at the end of his second Chapter exhorts international lawyers not to "postpone the urgent tasks of sociological review of this body of law until after the methodological problems are solved. We must rather, while conscious of the basic preliminary questions, do what can be done even now to expose, within the mass of professed rules of international law, the concealed contradictions, gaps, evasions, escapes, ambiguities and illusions which are revealed when these rules are confronted with the facts of contemporary international life" (p. 48). This, therefore, is a book which nowhere refrains from criticism, from efforts at "debunking," from attack against what the author describes as "paper" formulae, or from comparison of law with facts. Such tendencies do not come unexpectedly from an author to whom international law (which according to an earlier, curious sentence (p. xxxi) "provides for its own destruction by the mere private force of its own subjects") "in the world of today is like the thin crust of a thermal region of the earth's surface—it cracks easily and when cracked exposes the seething and hissing and bubbling and bursting interior which all land (and all law) at some depth or other encases" (p. 40). Which, one is tempted to add, is thus not peculiar to international law.

There is, of course, much to be said for "a treatise on the dynamics of Disputes- and War-Law," as Professor Stone describes his work in the subtitle. It adds substantially to what is at present a fashionable school. The views expressed in it and the reasoning on which they are based are interesting and deserve close attention. The author's scholarship as well as his power of analysis command respect. Every recognition is due to the weight of the contribution which the author has made and to which almost each page of this large volume bears witness.

Yet, with great deference, the question must be asked what permanent and constructive benefit international law can derive from a book which, while it is written with an obvious sense of responsibility, discloses a measure of impatience that is perhaps not really merited and in any event constitutes a source of danger. By way of illustration—it is taken at random and may not be the most significant one—reference may be made to Professor Stone's discussion of submarine warfare. He acknowledges the "very clarity of the legal position," but thinks that "when confronted with Germany's systematic violation" of all its aspects and with Allied retaliatory practice it "must itself give pause to easy progress" (p. 597). Later he speaks of "the illusion . . . of disposing of the present problem by a well-merited chastisement of German lawless *Schrecklichkeit*." He condemns this on moral grounds, but doubts "the adequacy of so blinkered an account as a basis either of exhortation or prognostication as to future wars, or of the framing of new rules." He suggests the view, on the contrary, that no such basis will be found until the whole matter is "conscientiously viewed in the context of the full emergence of the economic arm of warfare, with the annihilation of enemy maritime commerce as a major naval objective" (p. 605). In justice to Professor Stone the point under discussion should perhaps also be illustrated by his treatment of another, more "legal" and less "dynamic" topic. There cannot really be any doubt that the Hague Regulations have, to a large extent, proved a valuable and effective piece of international legislation. They contain gaps. They leave room for uncertainty. They are subject to, and capable of, change and adaptation, *e.g.*, in the case of central banks, as the learned author clearly perceives (p. 730). But one should have thought that to the lawyer this means no more than that he regards it as his duty and privilege to derive from the text and spirit of the Regulations and the judicially sanctioned practice such fresh or additional rules as the case at hand may require. Thus he will not find any insurmountable difficulty in the provision that the occupant must respect the laws in force unless "absolutely prevented." Professor Stone, however, thinks that, unless the words "absolutely prevented" are taken literally, the boundaries of the Occupant's powers are still to be drawn, that it becomes "increasingly difficult to say what is a fundamental institution" and that "the greater and more rapid change in modern societies, for instance in collectivist movements, raises questions to which the distinction provided no clear answer" (p. 698); there is even a note of doubt of, or at least the absence of clear assent to, the proposition that in 1944 the Allies were entitled to abolish the basic Nazi laws (*ibid.*, note 22). When he comes to protection of private property the author refers to German practices during two wars and thinks that "whether they were legal or not, they raise the question whether modern warfare on its economic side may not have overtaken this branch of the law" (p. 708). It is small wonder, then, that he speaks of the Hague Regulations' "somewhat exotic survival" (p. 727), that in his view they "remain where and as they were, but they no longer command the landscape" (p. 727), that "many factors have operated in the present century to destroy [*sic*] the rules based upon" the distinction between Occupant and Sovereign and upon the inviolability of the private economic domain (p. 728). Even assuming that these and similar strictures were well founded, is it not the lawyer's task to develop rather than destroy? How would the common law have fared if

its great masters had written it off as unsuitable to modern conditions rather than discovered and moulded its principles?

It is, of course, not the point of these observations to question Professor Stone's title or qualification to express his views with complete liberty and bluntness. Nor, let it be repeated, can there be any doubt that his views are as interesting, instructive and, frequently, attractive as they are challenging. Nor can any reader help being impressed by the general character and content of this work, which, in order to find room for emphasising its specific features, could only be hinted at in the present review. The sole question in issue is whether Professor Stone's method of approach is the most likely one to advance the cause of international law as a whole. It is this question, and the answer to it, which may throw more light upon his recurrent opposition to Professor Lauterpacht, among others, than his preference of facts and realities to the latter's alleged "formal position" (p. 410). "evasive circuity" (p. 412) or "escapes into verbal illusion" (p. 630).

F. A. Mann.

Political and Civil Rights in the United States : a Collection of Legal and Related Materials. By Thomas J. Emerson and David Haber. [Buffalo, New York : Dennis & Co. Inc. 1952. xx and 1209 pp. (with index).]

This is a volume in the well-known United States Case Book Series and like most of its fellows is a monument of painstaking erudition and scholarship. The amount of material provided would tax the industry of the hardest working student—the number of references to the relevant literature would keep him going during a long period of postgraduate study.

It is the vast amount of material on the subject which is of the greatest significance to the English student. There is perhaps some fat on the body of the case material, and like most modern American books of this type the authors make use of congressional and other reports, articles, statements of policy, etc., to provide a background for the judicial pronouncements. Yet here we have, when all is said, literally hundreds of cases in which American citizens have sought, and sought on the whole with success, to safeguard their political and civil liberties in the courts. When one begins to make a comparison with the English material one rubs one's eyes: the Americans must have something like fifty cases for our one. Moreover, a very large number of the cases given in this book, perhaps the majority, are quite recent ones, many within the last four or five years, for the authors evidently desired to make their statement as contemporary as possible, and they have therefore chosen to treat some of the classical decisions like *Schenck* v. *U. S.*, and *Abrams* v. *U. S.* quite shortly, while, cases like *Kunz* v. *N. Y.* (1951) and a small group of similar decisions which deal with the lawfulness of a licensing system in connection with the holding of public worship meetings in the streets of New York, and similar problems are given up to thirty pages, without counting the notes. In the result it is plain enough that one's general impression that civil liberty is a very live issue in the U.S.A. is abundantly confirmed, and it is made quite clear that this is a practical branch of jurisprudence of which a lawyer needs to have a real working knowledge.

Does this volume confirm the widespread feeling that civil liberties are perhaps in danger in the U.S.A. at the present time? Hardly so. For one thing the courts are alive to the importance of the issue, and those who feel that their rights have been infringed are ready enough to fight it out in court. One wonders how many Englishmen would not rather sit down and accept defeat than incur the notoriety and expense of proceedings. Again

much of the litigation which figures in this volume is concerned with the borderline debatable territory between freedom and licence, with the working out of the practical details of securing that real freedom to speak or write or associate is safeguarded. The territory of freedom is broad and well safeguarded, but large areas on the frontier may be lost during Communist witch-hunting, in respect of which the "guilt by association" cases like *Adler* v. *Board of Education* (1952) are significant. Fortunately the Americans are not strait-jacketed by a rigid system of precedents, so that lost territory may be regained in happier times.

One reason why there is so much more civil liberties litigation in the United States than here is that these rights are guaranteed by the constitution, so that state laws, municipal laws, university regulations, and other edicts can be challenged in the Supreme Court in a way which is not possible to us. And of course within each state there is the possibility of local litigation.

Another is that the conditions of American society give rise to a danger of infractions of liberty which hardly arises in England. Inter-racial discrimination and the aftermath of the Civil war posed numerous problems which are reflected in the pages of this book. Again so many of the universities are state controlled that charges of political discrimination are likely to arise, and have in fact resulted in numerous actions in the courts—one chapter in the book running to about 120 pages is devoted to academic freedom, and while here a substantial proportion of the material is not case law the greater part of it is. It would be difficult to put together anything resembling a chapter on this topic in England, though after all much the larger part of our educational system is as much, or more, state controlled as that of America. I suspect that we are more easy going, and that it is more difficult to make political capital out of witch-hunting here than in the U.S.A.

It will have been seen already that this book covers wider ground than we should be ready to regard as civil liberty in England, and I have not mentioned such matters as the right to franchise, or that of discrimination in respect of such matters as housing, transport, and employment which are dealt with in substantial chapters.

A great deal of the book makes excellent, if often disturbing, reading. Civil liberties cases afford opportunities for eloquence, and there is always on the American bench a proportion of judges trained in a more florid style of rhetoric than has for long been fashionable in this country. The result is sometimes a judicial declaration which warms one's heart in a way which is rare with our own law reports. I will close therefore with an extract from the dissenting judgment of Justice Douglas in *Adler* v. *Board of Education* (1950), in which the Supreme Court upheld the so-called Feinberg Law under which membership of seditious societies disqualifies for employment in the educational service of New York. "What happens under this law is typical of what happens in a police state. Teachers are under constant surveillance, their pasts are combed for signs of disloyalty; their utterances are watched for clues to dangerous thoughts. A pall is cast over the classrooms. There can be no real academic freedom in that environment. When suspicion fills the air and holds scholars in line for fear of their jobs, there can be no exercise of the free intellect. Supineness and dogmatism take the place of free inquiry. A 'party line'—as dangerous as the party line of the Communists—lays hold. It is the party line of the orthodox view, of the conventional thought, of the accepted approach. A problem can no longer be pursued with importunity to its edge. Fear stalks the classrooms. The teacher is no longer a stimulant to adventurous thinking; he becomes instead a pipe line for safe and sound information. A deadening dogma takes the place of free inquiry. Instruction tends to become sterile; pursuit of knowledge is discouraged; discussion often leaves off where it should begin."

C.

WILLIAMS ON EXECUTORS AND ADMINISTRATORS. Thirteenth Edition. By SIR DAVID HUGHES PARRY, assisted by D. C. POTTER. [London: Stevens & Sons, Ltd. 1953. Vol. 1, ccxxviii and 502 pp.; Vol. 2, 845 pp. (with index). £8 8s. net.]

WILLIAMS ON EXECUTORS has never been a very satisfactory work. As a field for a treasure hunt it has afforded scope that was virtually unlimited, although unfortunately by no means unrivalled in the sphere of legal publication. Its great authority gave a special value to anything it said so the treasure was surely there. The problem was to find it, the index often providing scarcely a clue. With every new edition there is a chance that the index may be better and so one turns with hope, if not with confidence, to this one. It does not wholly disappoint. This index takes up only about half as many pages as that in the twelfth edition but is more useful although there is still ample room for improvement.

In its enviable slimness this edition reflects no doubt the rigours of our time but some of us have paid our last respects to friends whose slimming under the direction of their doctors has proved too successful. No one would like such a fate to befall *Williams* and so one looks a trifle anxiously to see whether what has gone was fat or brawn.

Altogether this edition has 211 fewer pages than its immediate predecessor and the publishers tell us that "the first 130 pages of the twelfth edition dealing with the Origin and Nature of Wills have gone." We can hardly complain about that, for this is a work on administration and there are works on wills which cover the same ground rather better. When the publishers go on to say that the section on Estate Duty has been reduced we begin to feel a trifle uneasy but there are plenty of books on that subject too. Not much of any value has been lost by shortening this section of the new edition. What is really alarming is the publishers' statement that "much obsolete matter concerning pre-1926 law and practice . . . has been cut." Opinions may well differ as to what is obsolete. If it is something which cannot now make a material difference by all means leave it to the historians, but the lawyer is entitled to look to a work like *Williams* for guidance even on problems which are becoming less common than they were. In many cases the position today is determined by the position under the old law and it is sometimes necessary to apply for grants, particularly grants *de bonis non*, to estates of persons who died before 1926, yet the editors say (at p. 161) that "in view of the diminishing frequency of applications in respect of pre-1926 deaths it has been thought sufficient for a general summary of the law to be given in this edition and to refer readers to the fuller treatment contained in the twelfth and earlier editions of this work." This is not good enough. No one can expect that every aspect of a subject will be dealt with even in a book that is supposed to deal exhaustively with its subject but one is entitled to expect that nothing that can assume practical importance today is deliberately left out. Who wants two, let alone three, editions of *Williams*? Yet some of us are compelled to find shelf room for them and the oldest of them is sometimes found to be the most useful.

Williams owes its standing not only to the eminence of its author but to the care which he and successive editors took to see that they stated the law with accuracy and cited authority for what they said. The new edition now and then seems to fall short of the former standard. If it be true, for instance, that section 36 of the Administration of Estates Act, 1925, "does not authorise a personal representative to make an assent in favour of a purchaser from him" (p. 775, note 82) an authority for this would be welcomed since there must be some apprehension about it, many lawyers

taking the view that you can have an assent by a personal representative in favour of a purchaser although such an assent must be stamped as a conveyance. The editors themselves say of an assent that "if not under seal and not in favour of a purchaser it need not be stamped" (p. 776) and for this the relevant authorities are given.

Also on p. 776 there is this passage: "It has been held that, notwithstanding the provisions of the A. E. Act, 1925, s. 36, an executor to whom land is devised beneficially may by conduct assent to the vesting of an equitable interest in himself as devisee, without executing an assent in writing; but although such an assent is enough to debar the executor from disclaiming the devise, it does not vest the whole legal and beneficial interest in the land in the executor, so as to enable him to make a good title as a beneficial owner; accordingly an assent is still required." For this *Re Hodge* is cited and there are references to *Re Yerburgh* and *Re Pitt* but the passage is not quite accurate. What Farwell J. said in *Re Hodge* was that "if a vendor is selling as beneficial owner taking under a will, the purchaser is entitled to require a written assent in order that he may be satisfied as to the title, and the Act gives him the right to demand it," (at 264) but earlier in the judgment the contention that the property could not have vested in the executor as beneficiary or devisee because there had been no written assent was expressly rejected. The position appears to be accurately stated on pp. 868 and 869.

In some other respects the work is inadequate. It is disturbing to find that the only mention of section 36 of the Settled Land Act, 1925, is a reference to the subsection (6) which defines the statutory trusts for the purposes of that section and that *Re John Thomas* [1939] 1 Ch. 513 is not even noticed. *Re Cugny's Will Trusts* [1931] 1 Ch. 305 is cited only as an authority for saying that section 22 of the Administration of Estates Act, 1925, does not apply to land which on the death of the testator ceases to be settled. It is important to add that if on the death of the tenant for life persons become entitled to the land in possession in undivided shares it remains "notionally" settled, although it becomes subject to a trust for sale in the hands of the person who happens to be the estate owner, and if that person happens to be a personal representative it is his duty to vest it in the trustees of the settlement should they require it. It is in cases like this, where what has already ceased to be a settlement remains a settlement, that ordinary mortals in their perplexity seek assistance from the pundits and in this instance seek in vain.

The book is so well printed that it is even better than previous editions in this respect. A notable change is the omission of the marginal summary, which formerly gave the gist of each paragraph, and the substitution of a brief heading which indicates the topic of the paragraph or paragraphs which precede the next heading. These headings are in heavy type and are numbered, presumably with a view to the issue of Supplements in future years. In the work itself there do not seem to be any references to these numbers but there are numerous and helpful cross references to pages. These might with advantage be more numerous than they are. It is annoying to find a reference to a whole section of a chapter instead of to the relevant pages, as on p. 216 where the reader is told that all grants *de bonis non* made after 1925 are subject to the principles discussed in Chapter 16, s. 3, of the work. This demands a reference back to the Table of Contents or a search in the Chapter when found. A page reference would obviate this.

If it is easy to find fault with *Williams* this should not obscure the merits of the work in its latest form. After all it has been written by lawyers for lawyers and we ought to know how human they are. On innumerable topics the book has excellence; on retainer, for instance, no one could wish for a more helpful guide. As it consists of two handsome volumes any practising lawyer

will find it well worth its price if only for the impression it will make on his clients.

G. L. Haggen.

Legal Ethics. By Henry S. Drinker, Member of the Philadelphia Bar, Chairman of the Standing Committee on Professional Ethics and Grievances of the American Bar Association. [New York: Columbia University Press; London: Geoffrey Cumberlege, Oxford University Press. 1953. xxii and 448 pp. 32s. net.]

For something like three centuries there have been close links between the legal professions in this country and America. The Pilgrim Fathers took the common law with them when they left these shores in 1620; and the result is that just as today it is the foundation of the law of England so also it is the foundation of the law of the United States. There are of course marked differences in the administration of criminal justice in the two countries as I found for myself when I visited the United States in 1952. But there can be no doubt that advocates in England and the United States share the same high traditions of professional conduct.

It is therefore fitting that Mr. Drinker should begin with a short history of the Bar in England and the United States. In the course of it he sketches the educational system which was developed in England in the four Inns of Court. Then, referring briefly to the history of the Bar in the United States, he points out that the young men who, in colonial times, went to study law at the Inns of Court, on their return became leaders in their respective communities. "Due to their influence and competition," he says, "high standards of education, craftsmanship and conduct were there established and maintained in the period immediately following the Revolution."

Mr. Drinker then describes how during the second third of the nineteenth century there developed a growing hostility against special privileges granted by the government. Professions, and particularly bar associations, he says, were deemed undemocratic and un-American. This manifested itself everywhere in a lowering of the required qualifications of character, education and training. In a number of states statutes and even constitutional provisions were passed upholding the inherent and "natural" right of every voter of good moral character to practise law. In others the right of admission was assured after a brief period of study. There was also widespread objection to the organised Bar as a "secret trade union" or a privileged class not open equally to all citizens. "In the period immediately after the Civil War," says Mr. Drinker, "the Bar reached its lowest ebb."

About 1875 the leaders of the Bar began the movement for the re-establishment at the Bar of standards of character, education and training, and also for the organisation of Bar associations all over the country. "This movement," says Mr. Drinker, "has grown and prospered, until now in every state it is recognised that for the protection of the public no one may practise law whose character has not been subjected to examination and found worthy, and who has not passed a prescribed test as to his education and training. Also Bar associations have been organised in all the states, in the District of Columbia, and in a great many counties."

The first code of professional ethics in the United States was that formulated and adopted by the Alabama State Bar Association in 1887. This is reproduced by Mr. Brooker as an appendix to his book. It was adopted with minor changes in other states.

In 1908 the American Bar Association approved a code of ethics consisting of thirty-two canons. These canons, says Mr. Brooker, received the hearty support of the Bar of the entire country. They have been amended from

time to time and some additions made; and they now number forty-seven. They also are reproduced as an appendix to this book.

I quote Canon 15, which deals with the question of how far a lawyer may go in supporting a client's cause:—

"Nothing operates more certainly to create or to foster popular prejudice against lawyers as a class, and to deprive the profession of that full measure of public esteem and confidence which belongs to the proper discharge of its duties than does the false claim, often set up by the unscrupulous in defence of questionable transactions, that it is the duty of the lawyer to do whatever may enable him to succeed in winning his client's cause.

"It is improper for a lawyer to assert in argument his personal belief in his client's innocence or in the justice of his cause.

"The lawyer owes 'entire devotion to the interest of the client, warm zeal in the maintenance and defence of his rights and the exertion of his utmost learning and ability'" [the part in single quotation marks is from Judge Sharswood's *Professional Ethics*, published in 1854] "to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied. No fear of judicial disfavour or public unpopularity should restrain him from the full discharge of his duty. In the judicial forum the client is entitled to the benefit of any and every remedy and defence that is authorised by the law of the land, and he may expect his lawyer to assert every such remedy or defence. But it is steadfastly to be borne in mind that the great trust of the lawyer is to be performed within and not without the bounds of the law. The office of attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicane. He must obey his own conscience and not that of his client."

This is a comprehensive and authoritative book. It is comprehensive because it deals with every aspect of legal ethics—Part I is concerned with the "Organisation of the Bar and of disciplinary proceedings" and Part II with "The duties and obligations of lawyers": in particular, the lawyer's obligations to the public, to the courts, to his client, to other lawyers. It is authoritative because Mr. Drinker has been a member of the American Bar Association Standing Committee on Ethics and Grievances since 1939, and its chairman since 1944. The book is published under the auspices of the William Nelson Cromwell Foundation, which was created in 1930 for the purpose (amongst others) of the "cultivation of the highest standards of ethics, honour and conduct in the practice of law."

An important feature is an appendix containing some 300 rulings of the American Bar Association Standing Committee on Ethics and Grievances which have hitherto been unreported.

Altogether it is a book which certainly should be added to the libraries of practising lawyers in the United States; and one cannot doubt that lawyers in other countries also will find in its pages guidance on a variety of professional problems.

J. P. Eddy.

The Right of Property. By Fr. Vinding Kruse, ll.d., Vol. II: Translated from the Danish by David Philip. [Oxford University Press. 1953. 335 pp. Price in U.K. only, 21s. net.]

In the first volume of this very important and learned work (published in English in 1939), Professor Kruse discussed the principles and limitations as well as the various types and objects of the right of property. That part was more predominantly concerned with the social foundations, justifications and limitations of the right of property, than the present volume which

is in the main a detailed comparative treatise on the transfer of property in land and chattels.

The author has the unusual distinction that his individual draft became the Danish Registration Act (Tinglynsningsloven) of 1926. The reasons leading to this important reform of the Danish law of registration of land titles—substantially adopted in Norway and Sweden—as well as the details of its regulation form the core of this volume. But in the process, the author discusses in considerable detail the comparative position of a number of other systems, in particular the German law—which he frequently criticises—and English and French laws. Unfortunately, the author gives only a few lines to the Torrens system which, from Australia, has spread to other parts of the British Commonwealth and, in many respects, is superior to the English registration system.

In the now rapidly growing literature of comparative law, Scandinavian law still is unduly neglected, largely because of linguistic difficulties and the relative paucity of Scandinavian legal literature available in English, French or German. For this reason alone, the present translation ought to be warmly welcomed. It is, however, important for many other reasons. The present reviewer knows of no other treatise which, in the process of evaluating the different problems of registration of title in land and other property rights, goes as deeply into the very structure of legal transactions, the nature of contracts and the weighing of the economic interests of the different parties concerned—the contracting parties, subsequent purchasers or creditors, and the public represented by the State authorities. The author is always conscious of the economic and practical aspects of this subject-matter. The result is a profound and fascinating comparative study though it makes no easy reading. (It is difficult to decide whether this is due to the style of the author or to the often awkward translation.)

Professor Kruse first considers the general role of the legislator in contractual relationships. He then proceeds to discuss the problems created by the transfer of real property on the one hand, and by personal property and other movables on the other hand. The transfer of property in land and, in particular, the various aspects of registration occupy the main part of the book. It is perhaps not unnatural that Professor Kruse should be almost unreservedly enthusiastic about the present Danish system which is largely of his own creation. The essence of this system is an attempt to introduce into modern Scandinavian law the undoubted advantages of comprehensive registration of property and other rights in land, without sacrificing certain Scandinavian traditions, and above all, making the system unnecessarily cumbrous and costly, as in the author's opinion has been the consequence of the system introduced by the German *Bürgerliches Gesetzbuch*. The author's main criticism—largely reflected in the new Danish law—against other registration systems, especially the German one, is twofold: they have, in his opinion, neglected to distinguish clearly between three different functions of a land register, *i.e.*, the priority function, the validity function and the legitimative function. The first is concerned with the respective priorities where the property has passed through a number of hands and an abnormal circumstance, such as a double sale by one party, or bankruptcy of one of the parties, occurs. The author stresses that the regulation of priorities must be left to the *law* and not to the *parties* because business security is involved. By contrast, the validity of a transaction as between the parties is concerned with the consequences of a defect in the transaction, in regard to subsequent purchasers and creditors, and it is dominated by quite different considerations. Finally, the legitimative effect concerns the power given by registration to the registered person to dispose of the registered land or mortgage and again represents a different aspect of registration.

The second criticism, aimed in particular at the German system, is directed against what the author considers an unnecessary and exaggerated

romanistic distinction between obligation (*jus in personam*) and the *dingliches Recht* (*jus in rem*). German law, based on romanistic doctrine, has carried this distinction to extremes, and many students of German law will agree with the author in his criticism of the extreme artificiality of the application of this principle to transactions in land. Thus the German Civil Code distinguishes between the obligatory agreement to transfer land or interest in land, and the *dingliche* agreement to transfer the land which forms part of the transfer of the ownership itself (the other part being entry in the land register). As the author points out, the severity of this distinction is mitigated by provisions which in German law allow for the securing of personal rights through *Vormerkung* and *Widerspruch*. But Professor Kruse is unquestionably right in his contention that the result is an extremely cumbrous and complicated system of land law which gives satisfaction perhaps only to the subtle analytical mind but not to the practical conveniences of commercial life. The Danish law has, under Professor Kruse's influence, taken note of this criticism by not restricting registrable interest in land to so-called *dingliche Rechte* but by permitting the registration of any right which in its nature is suitable for such registration. The common lawyer will, of course, feel sympathetic to Professor Kruse's criticism because the common law has never clearly marked out the distinction between the *obligatorische* and the *dingliche Rechtsgeschäft*, the law of trusts being a particularly notable intermediary construction.

In similar vein, the author criticises the romanistic and German principle that property in chattels passes not on the conclusion of the contract but only on the distinct and different transfer of the property in the thing. He prefers the different solution of the English Sales of Goods Act. The German Civil Code, having stated that the physical handing over of a chattel is a necessary condition of the passing of ownership, admits two exceptions in the form of *traditio brevi manu* and in particular of the *constitutum possessorium*. The latter which permits the transferor to remain in effective possession of a thing or a complex of things on behalf of the transferee, has led to the most far-reaching and comprehensive perversion of the Code law, through the development of the *Sicherungsübereignung*. Unfortunately, Professor Kruse only briefly mentions this German development, though he gives some space to corresponding problems which have arisen in Danish law. By means of the *Sicherungsübereignung*, the German courts have sanctioned the wholesale transfer of stocks of merchandise or an entire complex of business assets to a creditor while leaving their actual physical control and the carrying on of the business to the debtor. By means of a series of ingenious constructions, even the goods which replace stock in the course of normal commercial transactions, automatically are substituted and thus pass immediately and automatically into the ownership of the creditor. Yet the courts have awarded this creditor not the full rights of the owner in bankruptcy but only a limited right half way between the rights of an ordinary debtor and the *Aussonderungsrecht* of the owner. Here is a most significant judicial development of the law in response to commercial needs. German writers have described it as a new customary law which has modified the Civil Code. But the development certainly underlines Professor Kruse's criticism of the romanistic doctrine which distinguishes over-sharply between the effects of the contract of sale and the separate transfer of the property, in the law of movables as well as of immovables.

It would require a full-length article to discuss even the main principles of the Danish legislation and the reasons for it as discussed in detail by Professor Kruse. Among the most significant differences are the modified preservation of the old Scandinavian principle of publicity of transactions in land, through the requirement of publication in a special official Gazette, or the most interesting distinction made by the Danish law between different

types of defects in the transfer, in regard to third parties. In the case of forgery, minority and violent coercion, the bona fide purchaser does not acquire title, despite registration. In the case of any other defect, such as mistake or deceit, registration of the defective title transfers a good title to the bona fide purchaser.

The present reviewer is in no position to judge how far Professor Kruse's claim that the Danish system has decisive advantages over all alternative registration systems is justified. There is no doubt, however, that Professor Kruse has in this work supplied an invaluable and very learned treatise and ample sources of comparison in a field which, because of its technicality, is not generally favoured by comparatists but which yields deep insights in the structure of legal systems and is, at the same time, of great practical and economic importance.

W. Friedmann.

The Growth of Scandinavian Law. By Lester Bernhardt Orfield, Foreword by Benjamin F. Boyer. [Philadelphia: Pennsylvania University Press. 1953. xx and 363 pp. 68s. net.]

The appearance of this book at a time of growing interest in comparative law serves as a reminder of the special claim of Scandinavian law to the attention of common lawyers. One remembers the ancient links with Scandinavia dating from the ninth century, one is vaguely aware of the achievements of the countries on the northern periphery of Europe in the fields of democratic government, social legislation and in regional co-operation, but only few common lawyers appreciate that the laws of the Scandinavian States occupy a position halfway between the systems of Continental Europe and those of the Anglo-American group.

This book, written by an American of Scandinavian descent, may stimulate curiosity rather than satisfy it. It is divided into four parts, dealing respectively with the laws of Denmark, Iceland, Norway and Sweden. This division is adhered to rigidly although the political history as well as the legal systems of these countries are largely common to them all. The result is a great deal of repetition which serves little purpose other than to inflate the size of the book. Even a subject such as Uniform Scandinavian Laws is discussed four times, and matters are not improved by such variations in treatment as have been achieved by stating, for instance, on one occasion that the Scandinavian Monetary Convention was concluded in 1874 whereas on the subsequent occasions the year is given as 1872, or by reserving to the last occasion the information that this Convention ceased to operate in 1914. The political history of each country which introduces each chapter is written as a catalogue of dates of mainly dynastic or military interest. The outlines of the legal systems which follow are presented under such rubrics as The Constitution, Local Government, The Courts, Social Legislation, Criminal Law, Legal Education, etc. The subject-matter of the earlier headings is described clearly and in adequate detail, but the material presented under some of the later headings is too sketchy or superficial to serve any useful purpose. Thus it is only in the chapter on Swedish law that one finds any discussion of Marriage and Divorce under a separate heading; the account of Illegitimacy under Norwegian law consists simply of a statement of nine lines made by a former American Minister to Norway.

In its present form much of the book gives the impression of a collection of preparatory notes which have been published without any sustained effort to give a consistent and balanced account of the subject. But the description

of the sources and of the judicial systems will be useful to those looking for a general historical introduction to the laws of the Scandinavian countries.

J. Unger.

Leading Cases in the Law of Banking. By Lord Chorley, m.a., of the Inner Temple, Barrister-at-Law, formerly Sir Ernest Cassel Professor of Commercial Law in the University of London, and P. E. Smart, ll.b., a.i.b. [London : Sir Isaac Pitman & Sons, Ltd. 1953. xxx and 324 pp. and (index) 5 pp. £1 10s.]

In their Preface to this new work, the authors state that it is intended to fill the need for an elementary casebook on the Law of Banking and is designed primarily for the ordinary candidate for the Diploma Examination of the Institute of Bankers. Consequently they include a short Introductory Chapter outlining such matter as the structure of the courts, the doctrine of judicial precedent and the system of law reporting.

The method adopted by the authors in this casebook is to take a group of cases illustrating a particular topic. The facts of each case are briefly but adequately and accurately given, then a clear summary of the decision, often with a short apposite extract from the judgment, and then follows a note, simply and lucidly expressed, on the legal issues involved in the case, substantially in the manner of a textbook, with references to the facts and decisions in other cases and to various arguments and other relevant matter in other textbooks.

Over 120 cases are thus dealt with, the topics being arranged in the order of the chapter headings in Lord Chorley's *Textbook on the Law of Banking*. Thus we start with cases defining the relationship of banker and customer, proceed through cases concerning the duties and liabilities of a banker in relation to cheques and other negotiable instruments, and then come to cases which deal with the keeping by a banker of his customer's account, including the keeping of such special accounts as those of infants and executors. The next group of cases illustrates legal issues arising out of other services rendered by a banker, such as the giving of investment advice and of documentary credits, and these are followed by an important section on the taking of securities for advances. Further cases show how the relationship of banker and customer may terminate, and finally we have a few cases on what is called Banking Administration.

From this it will be seen that the book is comprehensive in scope, although of necessity the choice of cases must be somewhat arbitrarily made, so as to keep the book within its very reasonable size. But the actual selection offers no grounds for criticism, especially since, even if a particular case is not chosen for full treatment, an adequate mention of it will invariably be found in the note which discusses that particular topic.

Where, as here, a casebook is designed to be something more than a bare recital of the facts and judgments in the chosen cases, the value of the resulting work must depend on the notes, which supplement these details and which, in this book, take up considerably more than a third of the pages. These are of a very high standard, explaining the law in clear simple language, and often of such a quality and length as almost to replace a textbook. Herein perhaps lies a danger as a student may be tempted to dispense with a textbook altogether, in which case he will find the going hard, as the text of the notes is highly condensed, and very occasionally the usual perfect clarity is sacrificed perforce to brevity. Even so, the good student, with a little added mental effort, ought to be able to overcome the difficulty and be all the better for his exertion. Furthermore, the inclusion in the notes of

frequent references to other cases and their facts should enable the student—especially the non-legal student in happy ignorance of the lawyer's sublime faculty for distinguishing cases—to avoid the temptation to treat the instant case before him, either in practice or in examination, as being absolutely on all fours with a leading case merely because the facts have a certain similarity.

When it may be added that the text is pleasantly arranged, and that, for a new book, text and tables are remarkably free from misprints, it will be realised that this book is indeed a valuable asset for anyone who is studying the law of banking, whether as a lawyer or a banker, and the authors are to be congratulated on achieving their purpose of "closing the gap."

C. F. Parker.

Introduction to the Study of Roman Private Law. By J. W. Cecil Turner, M.C., M.A., LL.B., Fellow of Trinity Hall, Cambridge. [Cambridge: Bowes and Bowes. 10 (Introduction, Table of Contents, etc.) and 104 (Text) and 21 (Appendices and Index) pp. 1953. 21s.]

This book is intended, according to the author's introduction, "for the use of students who are about to take their first steps in the study of Roman private law, without having previous knowledge of that system and, in most cases, also without previous knowledge of any other system of law." With this end in view, Mr. Turner has divided his book into two parts of roughly equal length. In the first part he gives an account of the main political institutions and constitutional history of the Roman State from its origin until the death of Justinian. Making no claim to original research, he has nevertheless provided a clear and useful constitutional background to the study of Roman private law. A student of law, even if only a beginner, would however expect some explanation of the judicial system and legal procedure, which is only briefly considered in a short paragraph at the end of the first part. Earlier references to the class from which *judices* were chosen or to the *praetor* could scarcely be understood by a student at a first reading. In the second part, Mr. Turner deals with the sources of Roman law, a subject which, it must be admitted, is dealt with in a number of other textbooks; but his treatment is full and he does not avoid the more difficult issues, as for example the authority of *responsa prudentium*.

Mr. Turner devotes a bare three-and-a-half pages to Roman law after Justinian, thereby inevitably giving little more than a rather formidable list of names and dates. This is much to be regretted. If in Mr. Turner's own words Roman law "is still an essential accomplishment in one who aspires to become an educated lawyer," one of the main functions of an introductory work should be to show the historical connection and continuity of ideas between Roman law and modern legal systems.

The appendices include a few, perhaps rather casually chosen, notes on the text, a list of important dates in Roman legal history, a survey of the sources of law, a list of Roman law compilations and of the chief jurists, a chronological table of the Roman emperors and a short bibliography for more advanced study. In an elementary work of this kind a more detailed guide to reading would be of value. In any event the list ought to include Schulz's *History of Roman Legal Science* and Wolff's *Roman Law: an Historical Introduction*.

In general, the book may be said to provide a sound rather than stimulating introduction to the study of Roman private law; it is rather expensive for its size and especially for the potential student purchaser.

N. S. Marsh.

BILATERAL STUDIES IN PRIVATE INTERNATIONAL LAW. No. 1: AMERICAN-SWISS PRIVATE INTERNATIONAL LAW. By ARTHUR NUSSBAUM. [Columbia University in the City of New York, Parker School of Foreign and Comparative Law. Distributed by Columbia Law Review, Columbia University, New York 27, N.Y. 46 pp. 7s. 6d.]

THIS new series of studies in the law of conflict of laws, edited by Professors Coudert and Nussbaum, is intended to supplement the standard textbooks of private international law by dealing with the specific problems arising in the legal relations between two individual countries. The editors claim that problems of this nature are not infrequently either entirely neglected or not sufficiently dealt with in the more general works. Professor Nussbaum's essay, which opens the series, proves to the full that this thesis is correct and that the new type of treatment constitutes a most valuable addition to the traditional method. Legal relations between the U.S.A. and Switzerland are governed by a treaty concluded in 1850. This treaty has found very scanty attention among legal writers and has in fact more than once been entirely overlooked by the courts themselves when dealing with cases in which it should have been applied. Its importance may be gathered from the fact that it prevents the grant of letters of administration by U.S.A. courts in respect of assets forming part of an estate situated in the U.S.A. governed by the rules of Swiss law. The treaty belongs to the group of bilateral agreements concluded at a time when the law of conflict of laws was far less well developed than it is today, a fact which results in numerous difficult problems of interpretation, all of which are tackled with great skill and notable success by the learned author. The second part of the book deals with selected topics of civil procedure. Practitioners will find this part particularly useful in view of the fact that the Swiss law of civil procedure, including the law relating to the enforcement of foreign judgments, is cantonal, not federal. Although it is, of course, impossible to give more than an outline of the law in force in a few of the more important cantons, the author has accomplished the astonishing feat of cramming a mass of important information into his booklet, which nevertheless makes attractive reading. Those acquainted with Professor Nussbaum's work will, of course, expect that an essay of his is not confined to being a mere practitioner's tool. The present little work will not disappoint such expectations. The author has provided plenty of food for thought to those in search of it. Even where one finds it difficult to agree with him—as, *e.g.*, in his preference for the Continental (as opposed to the English) method of obtaining evidence on foreign law—his views are always most persuasively presented, evidencing alike the author's eminence in the theory of his field and his long experience in its practice.

E. J. COHN.

ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS. HERAUSGEGEBEN VON MITGLIEDERN DES BUNDESVERFASSUNGSGERICHTS. 2nd vol. VIII. [Tübingen: J. C. B. Mohr (Paul Siebeck). 1953. 424 pp. 24.60 D.M.]

THE second volume of the official reports of the German Constitutional Court constitutes in a far higher degree than did its predecessor a mirror of the political life of the German Federal Republic. It opens with the memorable decision declaring the so-called "Socialist Reichs Party" to be unconstitutional. There can be little doubt that this judgment has greatly contributed to the crushing defeat which the Neo-Nazis suffered at the last general election. The court's arguments covering nearly eighty pages in print show

convincingly that a number of clever organisers had tried their best to revive the evil tradition of the early days of the Hitler movement, including the usual disguises, necessitated by the need for caution. The court refused to be deceived by such tricks. Abandoning the usual dryness of style unfortunately so characteristic of German Supreme Court decisions, the court in refreshingly clear language points out that the new party tried to copy Nazism in all or most of its most objectionable features. Many extensive quotations from the party's literature support the court's findings. Every serious student of the legal and social history of post-war Germany will profit from a careful perusal of the court's decision, which forms a landmark in the political development of Germany. One may well wonder what the course of events in Europe would have been had the old Reichsgericht shown comparable energy in the application of the law relating to the protection of democratic freedom.

The second volume contains the first two decisions on the struggle between the Socialist opposition and the parliamentary majority on the question of the ratification of the Bonn Conventions. The legal considerations on which the court's decisions rest will probably appear somewhat involved to foreign readers. But there can be no doubt that the proceedings in question seem to have contributed no little to demonstrating to the German public the questionable character of an opposition which fights the Government for no better sake than that of fighting. There is a third decision which similarly illustrates the methods employed by the opposition in the last Bundestag. The Land Baden concluded an agreement with the Autonomous Port Administration of Strasbourg relating to the administration of the Port of Kehl. The agreement which undoubtedly was highly advantageous to the interest of the Federal Republic duly received the consent of the Federal Government. The Socialist Party thereupon petitioned the constitutional court for an order declaring the Federal Government's consent to be an infringement of the rights of the majority of the Bundestag. The petition was rejected, the court pointing out in measured language that the Federal Government had acted entirely within its rights.

Among the other decisions there are some which are of interest to international lawyers, because they deal with the relationship between the Federal Republic and the occupation Powers. Another judgment will be welcomed because it declares unconstitutional a recent statute of Land Northrhine-Westfalia seriously infringing the well-acquired rights of former detainees of concentration camps.

E. J. Cohn.

Magistrates' Courts : Jurisdiction, Procedure and Appeals. By L. Rouse Jones, B.C.L. [London : Sweet & Maxwell, Ltd. 1953. xxxviii and 616 pp. (with index). £2 10s. net.]

Paley on Summary Convictions and the Magistrates' Courts Act, 1952. Tenth Edition by Edward Hughes and A. C. L. Morrison, C.B.E. [London : Sweet & Maxwell, Ltd. 1953. xxxi and 471 pp. (with index). £3 15s. net.]

It requires courage and industry to undertake a full-scale textbook on the jurisdiction and work of magistrates' courts. Mr. Rouse Jones has these qualities and they are combined with scholarship and a sufficient clarity of exposition, so that in the result we are given a volume of high excellence and considerable importance in its field. This new book has appeared almost contemporaneously with a new edition of the well-known Paley on *Summary Convictions,* which is, I think, the earliest textbook on a largely criminal law subject which is still current, having first appeared in 1814. It would not be surprising if Rouse Jones were to have as long a life as Paley.

As will be obvious from their titles the two books cover much the same ground, but they cover it in very different fashion, and there should be room for both of them on the shelves of every justices' clerk, and of every practitioner in magistrates' courts. Curiously enough at a time when Paley has, in a sensible degree, changed its character Rouse Jones appears on the scene to give something of the approach which was Paley's as well as to give much which is distinctive of its author. Paley has become in this edition very largely an annotation of the Magistrates' Courts Act, 1952, together with a commentary which is to a substantial extent taken from the pages of the old Paley. This work of annotation has been done with superlative skill, as indeed one would expect—since it was carried out by the present senior chief clerk at Bow Street and his immediate predecessor. Also it has been done remarkably quickly, for the preface was written in April, 1952, almost before the ink with which the Act was printed had dried.

The method adapted by the editors of Paley is to set out the terms of each section of the statute; next to indicate its provenance (as in the Indictable Offences Act, 1848, or one of the Summary Jurisdiction Acts); then to refer to the other relevant sections of the statute or to an apposite decision (in each case with an indication of the subject-matter of the cross reference); next to give the reference to the relevant Magistrates' Courts Rules, 1952 (made, of course, in pursuance of the Act and given in full later in the book); and finally to give the commentary, which in the case of some sections is of substantial length and is accompanied by its own index of contents: thus that to section 13 on "procedure on trial" extends to twenty-three pages, and gives a fairly detailed account of a trial in a magistrates' court.

It will be appreciated from the above sketch that Paley has become very much a book of reference, and has lost most of its readability. It contains, in addition to the Magistrates' Courts Act, 1952, the Rules made thereunder; also the full and elaborate set of forms issued with the Rules; a short chapter on the prerogative writs and habeas corpus; and chapters on proceedings against justices and against constables.

Although it was no doubt the approach of the Magistrates' Courts Act which stimulated Mr. Rouse Jones to embark upon his task his book is far from being limited to a commentary on that statute which, however, naturally comes in for close consideration in several of the chapters. Part I, for example, which is concerned with the general problem of the jurisdiction of magistrates, contains a great deal of interesting historical material of the kind necessary to place the whole matter in proper perspective. Chapter 4 also which deals with the Institution of Proceedings contains only incidental references to the 1952 Act, approaches its subject with a wide sweep and has sections on the right to arrest and the right to search; a perusal of the material on the latter subject incidentally reminded me how very unsatisfactory the law on the matter is, a point which came out clearly in the recent trial of Lord Montagu.

Chapter 5 on the Pleading and Selection of Charges is excellent. The possibilities have developed so much over the years that the matter has become exceedingly technical and difficult; it is scantily and inadequately dealt with in most of the older textbooks. The subject is, of course, one of great practical importance and the treatment given to it here cannot fail to be of value to prosecuting solicitors and clerks to justices. Other chapters naturally deal with the Hearing, the Determination, and Enforcement. Then we have Summary Civil Proceedings, a short chapter on Preventive Justice, and a more ambitious chapter on Indictable Offences. Part V deals with Appeals and Part VI with Separation and Maintenance. Licensing, however, is not discussed on the technical ground that the magistrates do not then sit as a court. There are several appendices, notably one on methods, other than appeal, of challenging decisions of magistrates. This, although short, suggests a number of expedients not referred to by Paley.

I have noted surprisingly few errors in this long and ambitious book, but on a number of occasions, due probably to over-compression in the treatment, statements are made which might mislead. Thus on p. 21 it is said that the High Court will not upset an acquittal by certiorari "though it is wrong on the face of the record or made without jurisdiction," and this might lead the unwary reader to think that the High Court will not take action in such a case, though all that is really meant is that certiorari is not the proper method of approach. Again on p. 55 reference is made to the use of the recognisance in connection with the prosecution of appeals. Appeals to Quarter Sessions, however, by the Criminal Justice Act, 1948, no longer need to be made effective by recognisance, as indeed the author points out on a later page, and the statement in the text should be limited to High Court appeals. At p. 87 on the question of the right to search on arrest it is stated that "there is a clearly established right in a constable" to do this "on making a lawful arrest," yet further down on the same page Williams J. is quoted as saying "that it is quite wrong to suppose that any general rule can be applied in such cases." Again what is meant by "property found in the accused's possession"?—presumably found on his person is meant, but the phrase might cover property found in his house, and it is just in respect of such property that there is no such right unless there is a search warrant, or the circumstances are of the limited type found in *Elias* v. *Pasmore* [1934] 2 K.B. 164. A number of other instances of this kind could be given, but enough has been said to make the point, and these blemishes will no doubt be removed in the next edition.

Finally attention may be drawn to the admirable use of contemporary authorities and judgments. It is noteworthy that a large proportion of these references are to the highly quotable remarks of Lord Goddard L.C.J. and indicate the impact which he has already made on this branch of the law during his tenure of office. Considering the substantial character of this volume and its admirable quality the price of £2 10s. 0d. is moderate and compares very favourably with Paley at £3 15s. 0d.

C.

Cases on Criminal Law. By J. W. Cecil Turner and A. Ll. Armitage. [Cambridge: at the University Press. 1953. xx and 568 pp. (with index). 45s. net.]

This book is really a new edition (the ninth) of Kenny's *Select Cases in Criminal Law* which was one of the first books of its type, if not the first, to appear in England. It was, of course, intended by Kenny to be used in connection with the study of his *Outlines of Criminal Law*. It is now generally recognised that that book set a new standard for students' textbooks, and the accompanying case book providing, as it did, material for the intensive study of some of the more important or difficult topics, was in its own way just as important an invention.

Purists have criticised books of leading cases of this type, mainly on the obvious ground that their use encourages students to neglect the study of cases in the original reports. This criticism, for what it is worth, is undoubtedly valid, but every experienced teacher knows that only a proportion even of industrious students are capable of using the reports to their real profit, especially those of earlier times. My own view is that for all except the best students a case book of the Kenny type is a decided help, and the large number of similar volumes which have appeared during the last twenty-five years indicates that there is a considerable demand for them. In the field of criminal law alone there are no less than three of these case books, each of them excellent in its way.

The present volume has been planned, as one would expect, to bring it

into line with Mr. Turner's edition of Kenny's *Criminal Law*. It is a pity that Kenny's name has been dropped from the title, and the omission is inexplicable since it has if anything been less altered in the process of editing than Kenny's *Criminal Law*. Almost all the old cases have been retained, although the additions, particularly from the very modern decisions, are extensive and, on the whole, well chosen.

The principal advantage of Turner and Armitage over its rivals is that, continuing the tradition of Kenny, it contains a substantial selection of cases on procedure and evidence. There are also certain aspects of the criminal law itself which are more fully dealt with here than in other books. Among these one may mention duress, ignorance and conspiracy. The last-mentioned topic has been looming rather large of recent years and it is helpful to have a good selection of cases relating to it, though actually not much has been added here to what was provided by Kenny, who was one of the first to realise the importance and difficulty of this crime.

A valuable feature of Turner and Armitage is the use of cases from other common law jurisdictions to provide illustrative material when there are gaps in our own case law on the subject being dealt with. A good illustration of this is the South African case of *R.* v. *Smith* on the defence of superior orders. It will be recollected that this case was relied upon by the late Viscount Simon in an article in *The Times* newspaper on this subject in support of his contention that an order by a superior officer to commit a criminal offence may be pleaded as a defence by a soldier who obeyed it unless it was so "manifestly illegal" that he "must or ought to have known" that it was unlawful. It will be helpful to many of us to have this case made so readily available. Mr. Turner has indeed a happy capacity for going off the beaten track for his material. *R.* v. *Caunt* is much the most important recent case on seditious libel. It arose out of an anti-semitic article in a Morecambe newspaper, and the valuable summing-up to the jury by Birkett J. was only reported locally. We should be grateful to Mr. Turner for rescuing it for us.

Unfortunately Turner and Armitage does from time to time follow its original too closely, and thus the old weaknesses appear in the new volume. As an instance of this we may take the inadequate treatment of "offences against the State" which are accorded only some thirty pages of letterpress out of 560. Again the useful modern practice of adding notes to the case summaries and extracts is used very sparingly in this volume.

Finally in these days of high prices it is worth noting that this substantial work can be obtained for the modest sum of 45s.

C.

NOTABLE BRITISH TRIALS SERIES. VOL. 79: THE TRIAL OF JEANNIE DONALD. Edited by JOHN G. WILSON, B.A., LL.B., ADVOCATE. [London: William Hodge. 1953. 305 pp. 15s.]

THIS volume in the Notable Trials series reports fully the trial of a middle-aged working-class woman for the murder of an eight-year-old girl living in the same Aberdeen tenement. No motive for the deed was suggested at the trial and the accused, taking consistently the line that she knew nothing about the case, refused to give even her legal advisers any information whatever. The proceedings in court turned in fact almost exclusively upon circumstantial evidence of a complex scientific kind, given by no fewer than eight eminent specialists in forensic medicine, including Professor Sidney Smith, all called on behalf of the prosecution. This evidence, though depending on a number of tenuous links, established (when pieced together) in a remarkable and unfailing manner that the accused was responsible for the death of the child, but all of it appears on consideration reconcilable with the theory, if not indeed

reconcilable *only* with the theory, that she acted in a mistaken panic on what she believed to be a corpse. It appears that the child, passing in the passage, annoyed the accused who, in a sudden temper, shook her by the throat. Unfortunately the child had an enlarged thymus and became unconscious. The accused, *thinking she was dead,* now lost her head and in an attempt to make it appear that rape had been committed on the little girl and so to throw the blame on some man, inflicted severe injuries on her with a sharp instrument. The sudden pain woke the child and she died of asphyxiation through vomiting.

This theory, if theory it is, was not advanced by counsel for the accused at the trial, placed as he was in an extremely difficult position owing to her silence and faced, moreover, with an obviously untrue statement about her movements made to the police during routine investigations; nor was the defence of culpable homicide ever raised. The death sentence was commuted and the prisoner released after serving ten years of her sentence, but it may well be that, had she had the courage to tell the truth from the outset, she would have got away with very much less.

The account of this trial is remarkable not only for the extremely intricate investigations carried out by the medical and bacteriological experts, but also for the great number of false scents on which the police were put as a result of public concern and indignation over the murder. One little boy, a school-mate of the murdered girl, not only gave, but repeated, a detailed account of seeing the victim dragged along the street by a middle-aged man whom he fully described, although he admitted next day that he had seen *nothing at all*: a story which kept a full-scale police search on the wrong track for the whole afternoon and evening until late into the night.

H. A. H.

Die Geschichte der Abschaffung der Todesstrafe in der Bundesrepublik Deutschland. Mit einem Vorwort des Bundesministers der Justiz Dr. Thomas Dehler. By Dr. Bernard Düsing. [Offenbach: Bollwerk Verlag. 1952. 342 pp.]

This is a carefully documented and most thorough study of the debates in successive German national assemblies since 1848 concerning capital punishment, which culminated in the abolition of the death penalty in the new constitution of the Federal Republic of 1949. Although a great part of the work is concerned with the attitude of the various German political parties to this controversial subject, there is a good deal of matter of wider interest and importance, especially in the chapter where the author has gathered together, from first-hand sources, information accompanied by up-to-date statistics about the treatment of murder and the death penalty in a great number of countries in Europe and overseas.

H. A. Hammelmann.

General Principles of Law as applied by International Courts and Tribunals. By Bin Cheng. [London: Stevens & Sons, Ltd. 1953. li and 490 pp. Price £4 4s.]

It is at the present time not open to doubt that not only the International Court of Justice, but every international tribunal and, indeed, every international lawyer is bound to have resort to "the general principles of law recognised by civilised nations" as one of the principal sources of international law. Yet the problem how to define and ascertain these general principles is largely unsolved. Its treatment in modern writings does not always correspond

to its importance. It frequently continues to be discussed in terms which are of the broadest character. The field-work remains to be done. This is a task to which international lawyers are called upon to turn as a matter of urgency.

In the circumstances Dr. Cheng's work is to be welcomed as a useful contribution. He has not undertaken an original investigation of the problem as a whole, but he has laid foundations by collecting some of the material on which the student of the future may build: it is the application of general principles of law in the existing practice of International Courts and Tribunals that is reviewed in this work. For this purpose the author divides his subject into four parts. The first deals with the principle of self-preservation: *salus populi suprema lex est*; according to Dr. Cheng the application of this general principle shows, *inter alia*, "that law, instead of being a mere agglomeration of abstract rules, is a purposeful discipline" (p. 389). The second discusses the principle of good faith, mainly in connection with treaty relations and the exercise (or abuse) of rights. The third is devoted to the general principles of law in the concept of responsibility. In the last and most extensive part the author inquires into such general principles of law as govern judicial procedure.

International lawyers will clearly derive substantial benefit from Dr. Cheng's study which provides them with a manual of precedent and practice. This in itself is an achievement which will deserve, and be received with, gratitude even in the absence of the justification given by the author (and emphasised by the publishers on the dust-cover) that if "the general principles of law are not to run the risk of being exploited as an ideological cloak for self-interest, it is essential that their scope and substance be clearly defined and understood" (p. xiv). However, international lawyers will be still more grateful to Dr. Cheng if, having satisfactorily discharged the initial task, he now accepts what Dr. Schwarzenberger describes in the foreword as the challenge thrown out "to the Doctrine of International Law to sail into new and uncharted seas."

F. A. Mann.

Laws and Practices Concerning the Conclusion of Treaties. United Nations Legislative Series. [New York: United Nations; London: H.M.S.O. 1953. xi and 189 pp. 22s. 6d.]

One of the most controversial problems concerning the law of treaties has, for many generations, been that of the effect of constitutional limitations upon the treaty-making power. Since the *Alabama Arbitration* (1872) it has been clear that a State is unable to plead the deficiencies of its municipal law to justify the non-observance of its obligations under international law. Likewise, since the arrangement concerning armaments on the Great Lakes, 1865 (Moore, *Digest of International Law*, 1906, vol. 5, p. 170), it has been consistently demonstrated that no State will tolerate a third State asserting that it has not observed the provisions of its own constitution relating to its international obligations.

In these days of democratic control of foreign policy, and particularly under the influence of the ratification article of the United Nations Charter (Article 110), constitutional provisions relating to the conclusion of treaties have acquired added significance. Despite the express terms of Article 110, the Charter was ratified by the Union of South Africa, and the instrument of ratification accepted by the Government of the United States of America, apparently not in strict accordance with South Africa's constitutional requirements as Parliamentary approval was not obtained (*Government Gazette*, 1945, No. 3570, cited in Kopelmanas, *L'Organisation des Nations Unies*, 1947, p. 122, n. 2).

At its second session the International Law Commission drew attention to the fact that "precise knowledge of constitutional provisions of other countries is essential to those who in any country are engaged in negotiating treaties." This latest volume in the United Nations Legislative Series issued by the Division for the Development and Codification of International Law of the Legal Department of the Secretariat seeks to satisfy this need. The constitutional requirements of 86 countries, both members and non-members of the United Nations, are given. Where a written constitution specifies the procedure, and 65 of these are named, the relevant provisions are reproduced. Where these are lacking, memoranda submitted by the governments concerned or prepared by the Secretariat have been used instead. In this way it is possible to compare the position in Yugoslavia with that in the Vatican City, the Soviet Union with the United States, Nationalist—but not Communist—China with the Mongolian People's Republic, or the Democratic with the Federal Republic of Germany.

The Report on the United Kingdom was prepared by the Secretariat and approved by the Foreign Office. It acquires added interest in view of the publication of the secret binding agreement between the Prime Minister and the President of the United States on atomic weapons in 1943 (Cmd. 9123, 1954). The Report indicates the practical limitations upon the treaty-making prerogative by reciting the fact that the Prince Regent declined the personal invitation sent to George III to join the Holy Alliance in 1815. In view of the exchange between the Foreign Secretary and Mr. Shinwell during the hydrogen bomb debate (April 5, 1954) it is as well to be reminded that the Foreign Secretary and the Permanent Under-Secretary receive on appointment "General Full Powers" authorising them to treat with third States, an indication that British practice is in accordance with the interpretation given to the Ihlen Declaration by the World Court in the *Eastern Greenland Case* (1933). Similarly, it is useful to remind the British people and the world that normally Parliament has no role to play in the treaty field, although by convention Parliamentary consent is probably required for the cession of territory.

If one reads the account in the *Laws and Practices concerning the Conclusion of Treaties* of the position in the Union of South Africa, it becomes clear that in strict law the Charter was correctly ratified. Although "Parliament itself has in the past ratified international agreements, it may be said that this is done only where the instrument is of great interest to the Union. No legislation requires such ratification." Despite its value the volume cannot help in deciding whether a particular "treaty" entered into by the United States requires ratification by a two-thirds vote of the Senate, by a Joint Resolution of Congress or whether a mere Executive Agreement will suffice.

As usual in the legal field the compilations of the United Nations Secretariat create an unredeemable debt.

L. C. Green.

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